



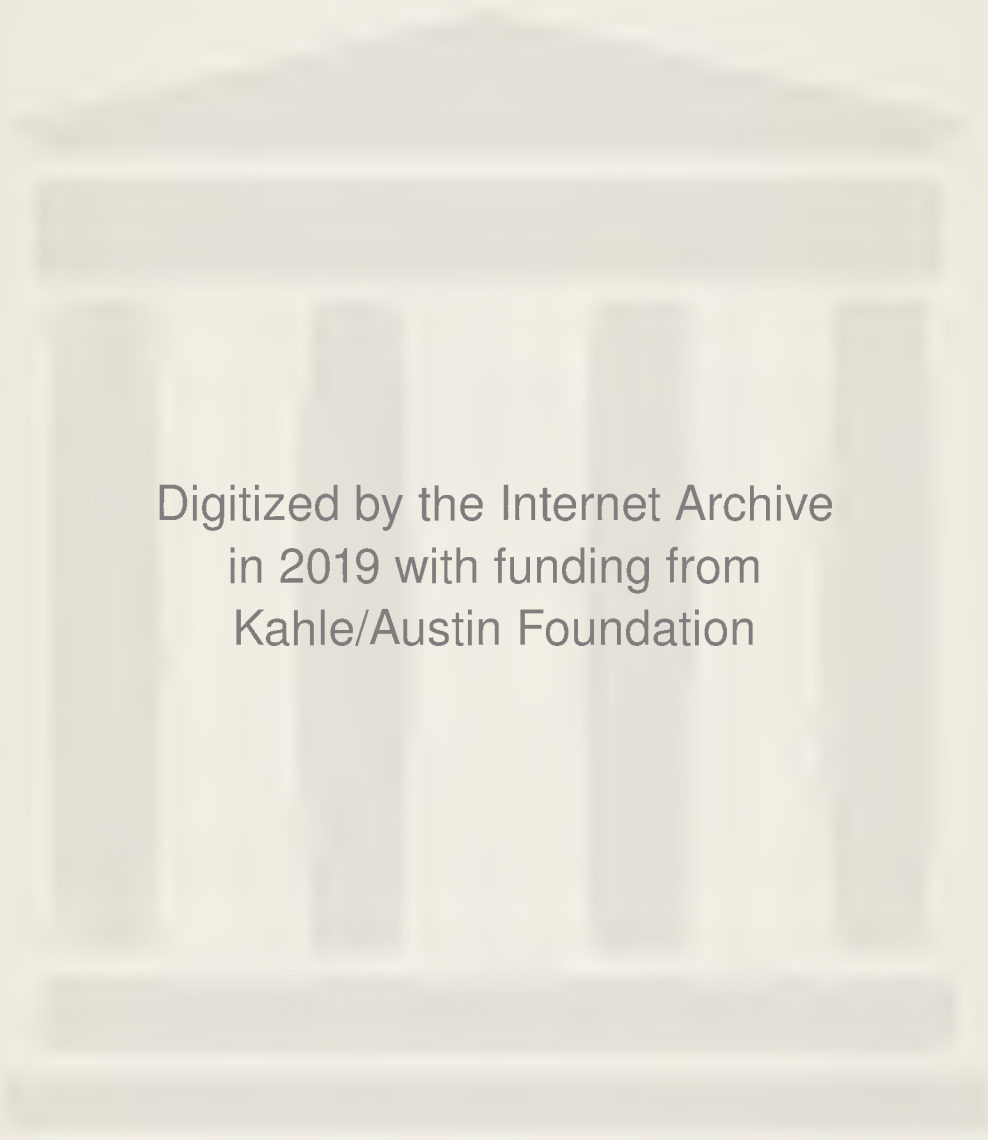


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INTERNATIONAL LAW





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ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS

10 ST. JAMES'S SQUARE, LONDON, S.W. 1

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# THE 'INTERPRETATION' OF THE CONSTITUTIONS OF INTERNATIONAL FINANCIAL ORGANIZATIONS\*

By DR. F. A. MANN<sup>1</sup>

ARTICLE XVIII of the Articles of Agreement of the International Monetary Fund, as amended in 1969, reads as follows:

*Interpretation:*

- (a) Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an executive director it shall be entitled to representation in accordance with Article XII, Section 3 (j).
- (b) In any case where the Executive Directors have given a decision under (a) above, any member may require, within three months from the date of the decision, that the question be referred to the Board of Governors, whose decision shall be final. Any question referred to the Board of Governors shall be considered by a Committee on Interpretation of the Board of Governors. Each Committee member shall have one vote. The Board of Governors shall establish the membership, procedures, and voting majorities of the Committee. A decision of the Committee shall be the decision of the Board of Governors unless the Board by an eighty-five per cent majority of the total voting power decides otherwise. Pending the result of the reference to the Board the Fund may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.
- (c) Whenever a disagreement arises between the Fund and a member which has withdrawn, or between the Fund and any member during liquidation of the Fund, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Fund, another by the member or withdrawing member and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the International Court of Justice or such other authority as may have been prescribed by regulation adopted by the Fund. The umpire shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.

A similar provision was, in 1944, included in the Articles of Agreement of the Bank for Reconstruction and Development,<sup>2</sup> and has, since then, found its way into the constitutions of other international organizations, such as the International Finance Corporation,<sup>3</sup> the Inter-American Development Bank<sup>4</sup> and the Asian Development Bank.<sup>5</sup> It is, therefore,

\* © Dr. F. A. Mann, 1969. <sup>1</sup> Hon. Professor of Law, University of Bonn; Solicitor, London.

<sup>2</sup> Article IX.

<sup>3</sup> Cmd. 9502. Article VIII.

<sup>4</sup> Article XIII.

<sup>5</sup> Article 60, *International Legal Materials*, 5 (1966), p. 262. Article 53 of the Charter of the East African Development Bank (*ibid.* 6 (1967), p. 1025) provides that 'any question of interpretation or application' shall be submitted to the Directors 'for decision'. But in the event of a

not without general interest to determine the scope and effect of the interpretative procedure which governs the life of such international organizations. This will be done with a view to Article XVIII of the Fund's Articles of Agreement, for the material relating to the Fund's practice and the publications of its legal advisers about the subject are very much richer than in the case of any of the other institutions. The conclusions reached in regard to Article XVIII, however, will not necessarily apply in the case of the other institutions which have followed the Bretton Woods pattern for, in so far as construction depends on other provisions of their respective charters, these may be different, so that in some respects there may be variations of result, albeit of a minor character.

# I

Whenever 'any question of interpretation of the provisions' of the Agreement arises between members and the Fund or between members, is submitted by the member or the Fund to the Executive Directors 'for their decision', and is decided by them, the procedure laid down by Article XVIII operates. Unless the question arises only within the Fund, it does not matter whether or not the decision is described as one rendered in pursuance of Article XVIII. Nor does it matter whether the member, the Fund, or the Executive Directors have Article XVIII in mind at the time when the question arises, is submitted or is decided. By giving to the decision some different label, Article XVIII cannot be avoided, even if this were intended by the Executive Directors. Conversely, by classifying a decision as coming within Article XVIII, a ruling cannot be given the character which it does not possess, and which in truth takes it outside the scope of Article XVIII.

These submissions which, it is believed, are fully supported by the plain text of Article XVIII, seem to be opposed to the practice of the Fund. It appears that there exist only ten interpretations which purport to be made under Article XVIII. In addition, 'a considerable number of interpretations have been necessary, in order to enable the Fund to function efficiently'. The overwhelming proportion of these interpretations have been adopted outside Article XVIII.<sup>1</sup> Moreover, so we are told, 'it must not be thought that there is any essential difference between interpretations under Article XVIII and those not adopted under that provision, apart from the more formal and authoritative character of the former'.<sup>2</sup> Yet there exists in the Fund 'the practice of making most of its interpretations outside Article

disagreement, including disagreement in respect of a decision under Article 53, the matter shall be decided by arbitrators whose decision 'shall be final and binding on the parties' (Article 54).

<sup>1</sup> Gold, *Interpretation by the Fund* (International Monetary Fund Pamphlet Series No. 11, 1968), p. 14. The forerunners of this publication, namely articles published by Mr. Gold in the *International and Comparative Law Quarterly* (1954), p. 256 and (1967), p. 289, have been superseded by the pamphlet, and will not hereinafter be referred to.

<sup>2</sup> Gold, *ibid.*, p. 15.

XVIII' and it is 'not easy' to say why this practice has developed.<sup>1</sup> This is particularly mysterious if it is realized that, in many cases, a decision purportedly made outside Article XVIII takes exactly the same form as an interpretation under Article XVIII. One example may suffice to prove this point. Thus, there is a decision made in 1948 outside Article XVIII, according to which<sup>2</sup>

... dealings in paper money and coins are deemed to be 'other exchange transactions' within the meaning of Article IV, Section 3, whether or not the importation and exportation of such money and coins to and from the country of origin are subject to restrictions. The dealings are in consequence subject to the provisions of that Section. Members shall not permit transactions in such paper money and coins within their territories in a manner or to an extent which will negate the par values agreed with the Fund. Where the transactions in fact have such an effect the Fund will be obliged to intervene.

Compare this, for instance, with an interpretation, admittedly made under Article XVIII, of Article VI, Section 1:<sup>3</sup>

The Executive Directors of the International Monetary Fund interpret the Articles of Agreement to mean that authority to use the resources of the Fund is limited to use in accordance with its purposes to give temporary assistance in financing balance of payments deficits on current account for monetary stabilisation operations.

Both 'interpretations' evidently deal with different points, but they are so similar in character, structure and language that it would be difficult to say which is, and which is not, an interpretation under Article XVIII. For the reasons which have been given, there cannot be any interpretation which fulfils the conditions contemplated by Article XVIII, yet falls outside it.

It is an entirely different matter that the Fund has developed 'a large number of principles and policies which are contained in many thousands of documents' and which 'are continuously adjusted to changing circumstances, are known to the Executive Directors and to the staff and to a lesser extent to the members. They constitute the internal law of the Fund, which would be applied in interpretative decisions'.<sup>4</sup> The point is that such 'principles and policies' are not interpretative decisions—not because they are made 'outside Article XVIII', but because their nature is such as to render Article XVIII necessarily inapplicable.

## II

The words 'question of interpretation of the provisions' of the Agreement do not touch three areas of considerable importance.

<sup>1</sup> Gold, *ibid.*, p. 15.

<sup>2</sup> *Selected Decisions of the Executive Directors* (Third Issue), International Monetary Fund (January 1965), p. 16.

<sup>3</sup> *Ibid.*, p. 54.

<sup>4</sup> Hexner, 'Interpretation by Public International Organizations of their Basic Documents', *American Journal of International Law* (1959), p. 341, at p. 350.



In the first place, a question of interpretation frequently arises against the background of a possibly disputed set of facts. In such a case it is important to remember that Article XVIII is concerned only with the abstract question of interpreting the Agreement, namely a question of law. It does not confer upon the Directors or the Governors jurisdiction to decide facts. Thus, it is a matter of interpretation what the conceptions of 'competitive exchange alterations'<sup>1</sup> or 'fundamental disequilibrium'<sup>2</sup> mean, or, indeed, whether, in an admitted set of facts, the requirements of the definition are fulfilled; but whether or not facts exist which are said to create 'competitive exchange alterations' or 'fundamental disequilibrium' is a question outside the scope of Article XVIII altogether.<sup>3</sup>

Secondly, a question of general international law arising independently of mere interpretation does not fall to be decided under Article XVIII. Thus, members 'may exercise such controls as are necessary to regulate international capital movements'.<sup>4</sup> Suppose that, in a particular case, it is alleged that either the introduction or the management of the control of capital transfers constitutes an *abus de droit*. This is not a matter which, in its factual or legal aspects, can be considered or judged by any organ of the Fund except, possibly, in a purely advisory manner. This does not mean that if, in the interpretative process itself, a rule of public international law falls to be considered this may not be applied or observed. On the contrary, any rule of public international law relating to the interpretation of documents would apply, and the question arising under Article XVIII must be interpreted against the background of public international law.

Thirdly, even where, in the strict sense of the term, mere 'interpretation of the provisions' of the Articles of Agreement is concerned, the interpretative jurisdiction conferred by Article XVIII is limited in scope, for it must never involve what may fairly be described as an amendment of the Articles of Agreement. Perhaps it would be desirable if the exercise of interpretative powers were less circumscribed, but on many occasions the interpretative process is likely to come up against Article XVII, which subjects the amendment of the Agreement to a special procedure.<sup>5</sup>

### III

The next, and much more important, question is whether the interpretative procedure contemplated by Article XVIII is judicial in character.

<sup>1</sup> Article IV, Section 4.

<sup>2</sup> Article IV, Section 5 (a).

<sup>3</sup> A different view, perhaps, is taken by Wengler, *Völkerrecht* (1964), vol. 1, p. 754, who admits that the words 'do not cover a dispute about a legally relevant fact'. But he adds that the Articles are 'probably to be so understood that they comprise even such disputes'. No reason is given nor, it is submitted, can any supporting reason be found.

<sup>4</sup> Article VI, Section 3.

<sup>5</sup> This point is well made by T. Treves, *Il Controllo dei cambi nel diritto internazionale privato* (1967), p. 218, who says that interpretation is concerned with one of several possible meanings, but can never be made *praeter* or *contra legem*.

If the answer were in the affirmative, it would hardly be open to doubt, for instance, that a member directly interested in a particular question would have the right to be heard, not only to be represented among the Executive Directors, as Article XVIII (a) provides. Moreover, the rule *nemo iudex in re sua*, well recognized in public international law,<sup>1</sup> might perhaps preclude a Governor whose country is a party to the dispute, and whose vote might be decisive, from participating in the decision on the question of interpretation. Or, if the procedure is judicial, it would have to be judicially exercised, and this would demand the application of legal rules and the exclusion of 'considerations of policies or expediency which are permissible for the administrator but which must be altogether excluded by the judge'.<sup>2</sup>

While some deny the judicial character of the decision under Article XVIII,<sup>3</sup> others assert it, albeit without giving reasons.<sup>4</sup> It is submitted that the latter view should be rejected and the interpretative procedure under Article XVIII should be treated as administrative.<sup>5</sup>

The reason can be put on the narrow ground of a comparison between Article XV and Article XVIII. The former<sup>6</sup> sets forth the penalties which

<sup>1</sup> See the advisory opinion of the Permanent Court of International Justice relating to *Interpretation of the Treaty of Lausanne* (Iraq Boundary), Series B, No. 12 (1925).

<sup>2</sup> *United Engineering Workers' Union v. Devenayajam*, [1968] A. C. 356, at 387 *per* Lord Devlin and Lord Guest—a case to which it will be necessary to revert.

<sup>3</sup> In this sense Fawcett (a former General Counsel to the Fund), this *Year Book*, 36 (1960), pp. 325 *et seq.*; Wengler, *Völkerrecht* (1964), vol. 1, p. 751.

<sup>4</sup> Broches, *Recueil des Cours* 98 (1959-III), p. 313, though he also says that there exist 'both judicial and legislative elements'. But, in effect, he denies the former by stating that the Directors may decide 'according to their own discretion'; this is wholly contrary to the judicial process. Seidl-Hohenveldern, *Das Recht der Internationalen Organisationen* (1967), No. 1312. And see the same author in 'International Arbitration' (*Liber Amicorum for Martin Domke*), p. 324. Alexandrowicz, *World Economic Agencies* (1962), p. 188, n. 1, says: 'The Executive Directors (having exclusive jurisdiction) would act in a quasi-judicial way.' This remark is in more than one respect inaccurate.

<sup>5</sup> Hexner, *loc. cit.* (above, p. 3, n. 4), at p. 367, approaches the problem, but does not answer it. In *Das Verfassungs- und Rechtssystem des Internationalen Währungsfonds* (1960), p. 76, he suggests that all interpretative decisions are 'in a substantial sense legislative acts'.

<sup>6</sup> Article XV: *Withdrawal from Membership. Section 1. Right of Members to Withdraw.*—Any member may withdraw from the Fund at any time by transmitting a notice in writing to the Fund at its principal office. Withdrawal shall become effective on the date such notice is received.

*Section 2. Compulsory withdrawal.*—(a) If a member fails to fulfill any of its obligations under this Agreement, the Fund may declare the member ineligible to use the resources of the Fund. Nothing in this Section shall be deemed to limit the provisions of Article IV, Section 6, Article V, Section 5, or Article VI, Section 1.

(b) If, after the expiration of a reasonable period the member persists in its failure to fulfil any of its obligations under this Agreement, or a difference between a member and the Fund under Article IV, Section 6, continues, that member may be required to withdraw from membership in the Fund by a decision of the Board of Governors carried by a majority of the governors representing a majority of the total voting power.

(c) Regulations shall be adopted to ensure that before action is taken against any member under (a) or (b) above, the member shall be informed in reasonable time of the complaint against it and given an adequate opportunity for stating its case, both orally and in writing.

*Section 3. Settlement of accounts with members withdrawing.*—When a member withdraws from the Fund, normal transactions of the Fund in its currency shall cease and settlement of all

the Agreement has devised to enforce its provisions, i.e. ineligibility to use the resources of the Fund and, eventually, expulsion, politely called 'compulsory withdrawal'. In both cases, under regulations to be adopted, Article XV, Section 2 (c) requires that 'the member shall be informed in reasonable time of the complaint against it and given an adequate opportunity for stating its case, both orally and in writing'. Where penalties of any kind are to be considered, this would seem to be a minimum requirement imposed by generally accepted principles of law. No such requirement is made by Article XVIII, which merely gives a member the right for 'a representative to attend' a meeting of the Executive Directors. There is, therefore, at least a strong *prima facie* case for suggesting that, in the absence of an essential element in the judicial process, Article XVIII cannot envisage judicial procedure at all.

The same conclusion is reached by a more broadly based line of reasoning. The problem of the definition of the judicial process has arisen on many occasions in municipal law. Whether there exists so wide a measure of agreement as to establish a practice of States, or a principle of law recognized by civilized nations, is a question which merits exhaustive comparative research. No attempt can at present be made to suggest an answer. But a possible, and perhaps probable, result of an inquiry can be indicated by surveying the experience which the practice of the British Commonwealth of Nations has evolved. This is material since, as is well known, the Anglo-American influence at Bretton Woods was considerable, and Anglo-American law is, therefore, a valuable tool in interpreting the Articles of Agreement.

It must at once be admitted that what in the British Commonwealth has become the recognized, though rather less than profound, definition of the judicial process is of no significance in the present context. Lord Simonds<sup>1</sup> on behalf of the Judicial Committee of the Privy Council and, following him, Lord Dilhorne<sup>2</sup> have said that it 'is as good a test as any other of analogy to ask whether the subject matter of the assumed justiciable issue makes it desirable that the Judges should have the same qualifications as those which distinguish the Judges of the superior or other courts'. This does not help in interpreting Article XVIII, because, *ex hypothesi*, both the Executive Directors and the Governors are bankers rather than judges and cannot, therefore, have judicial qualifications. But the cases have also spoken of a variety of more specific characteristics which are expressive of the judicial process. Most, or at least some, of these attributes were recently

accounts between it and the Fund shall be made with reasonable despatch by agreement between it and the Fund. If agreement is not reached promptly, the provisions of Schedule D shall apply to the settlement of accounts.

<sup>1</sup> *Labour Relations Board of Saskatchewan v. John East Iron Works*, [1949] A.C. 134, at 148-9.

<sup>2</sup> *United Engineering Workers' Union v. Devanayajam*, [1968] A.C. 356 at 367.



listed and discussed by Lord Devlin and Lord Guest in an opinion which, though a dissenting one, dissents less on the law than on the application of the law to the particular case at hand, namely, the nature of a Labour Tribunal created in Ceylon, and which, for present purposes, therefore, may be said to have great value. The remarkable fact is that few of the characteristics of judicial office mentioned in that opinion are to be found in, or required by, Article XVIII. Thus, Article XVIII does not presuppose a controversy about rights. It is not necessarily concerned with existing rights rather than those rights which it may be thought members ought to have in the future, and which, in municipal law, may be the subject-matter of arbitration. It says nothing about the manner of exercising the power conferred by Article XVIII; this may be of an entirely political or administrative or discretionary character, but it is in no sense such as is usually associated with a judge. This is made particularly plain by the fact that, in the last resort, the decisions are subject to the weighted votes which Governors enjoy; a system such as the weighted voting system is wholly alien to the judicial process.

Professor Hexner<sup>1</sup> is, no doubt, justified in suggesting that 'it would be far-fetched to imply from the absence of "judicial redress" and the unavoidable balancing of interests which is inherent in the interpretative machinery of the Fund that the rule of law, especially the principles of good faith and reasonableness, was not intended to apply in the rendering of interpretative decisions'. Yet, there is a far cry between the observance of good faith and reasonableness, characteristic of all relationships arising under public international law, and a judicial procedure.

It is, finally, not without significance that very many 'decisions' of the Executive Directors are couched in terms and expressed in a form which is alien to the judicial pronouncement. The Executive Directors tend to paraphrase the text of the Articles of Agreement without adding much or anything to them by way of interpretation. Frequently, therefore, they are tautologous in character. They do not even purport to speak the language of a decision-maker. Perhaps it will be helpful to look at a case which, on account of its great importance, was entitled to, but, in fact, did not receive, a clear interpretative decision.<sup>2</sup> In November 1953 the Executive Directors took the view that, contrary to its obligations under Article VIII, Section 5 (a), Czechoslovakia had failed to furnish the Fund with information about its official holdings of gold and foreign exchange, total exports and imports of merchandise, balance of payments and other matters there referred to. Moreover, the Fund took the view that Czechoslovakia had failed to

<sup>1</sup> Loc. cit. (above, p. 3, n. 4), p. 367.

<sup>2</sup> On the case discussed in the text see *ibid.*, pp. 362, 363, and Gold, *op. cit.* (above, p. 2, n. 1), pp. 11-14.

consult it as to the further retention of exchange restrictions as required by Article XIV, Section 4. The Czechoslovak Government's defence was that reasons of national security precluded it from furnishing the information or entering into the consultation contemplated by the Articles of Agreement and that, therefore, it had not committed any failure to fulfil its obligations, which justified the Fund in declaring Czechoslovakia ineligible to use the Fund's resources or to require it to withdraw from membership. On 11 August 1954 the Executive Directors issued an 'interpretative decision' which the Board of Governors confirmed on 28 September 1954, and which read as follows:<sup>1</sup>

Action may be taken by the Fund to require a member to withdraw when the following conditions have been met:

1. The member has been declared ineligible to use the resources of the Fund pursuant to Article XV, Section 2 (a);
2. A reasonable time has passed since the member was declared ineligible to use the resources of the Fund pursuant to Article XV, Section 2 (a), whether or not a fixed period of time had been prescribed in connection with such action, and the member persists in failing to fulfil its obligations;
3. The member has been informed in reasonable time of the complaint against it and given adequate opportunity to state, both orally and in writing, any fact or legal argument relevant to the issue before the Fund.

It will be observed that this interpretation simply repeats what Article XV, Section 2 (a) states, and wholly ignores the point raised by Czechoslovakia in defence. The point may have been good or bad, but no judge could or would have ignored it.

Another example of a slightly different nature is the often quoted interpretation of Article VIII, Section 2 (b), which the Executive Directors rendered in June 1949 and which states 'the meaning and effect of this provision' to be as follows:<sup>2</sup>

1. Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member which are maintained or imposed consistently with the Fund Agreement will not receive the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example by decreeing performance of the contracts or by awarding damages for their non-performance.
2. By accepting the Fund Agreement members have undertaken to make the principle mentioned above effectively part of their national law. This applies to all members, whether or not they have availed themselves of the transitional arrangements of Article XIV, Section 2.

<sup>1</sup> *Selected Decisions of the Executive Directors* (1965), p. 99.

<sup>2</sup> *Ibid.*, p. 73.



An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, Section 2 (*b*) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (*ordre public*) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.

The Fund will be pleased to lend its assistance in connection with any problem which may arise in relation to the foregoing interpretation or any other aspect of Article VIII, Section 2 (*b*). In addition, the Fund is prepared to advise whether particular exchange control regulations are maintained or imposed consistently with the Fund Agreement.

Without going through this decision word for word, it will be obvious to any legal mind that nothing is said in this 'interpretation' which is new or goes beyond a paraphrase of Article VIII, Section 2 (*b*), or, indeed, decides a single one of the innumerable and difficult questions of interpretation to which this Article gives rise. The only statement which could possibly be said to have interpretative effect is that if a State has accepted the Articles of Agreement, it cannot, except in case of inconsistency, refuse recognition to the exchange control regulations of other members on the ground that they are contrary to public policy. Even if so platitudinous an observation is treated as a decision on interpretation, the remaining sentences do not lend themselves to similarly benevolent construction.

In short, these interpretative statements are guide-lines issued by an administrative authority; they do not bear the hall-mark or carry the authority of a judicial pronouncement.

#### IV

The next, and by far the most important, problem raised by Article XVIII is: What is meant by the provision that the Board of Governors' 'decision shall be final'?

Professor Hexner has no doubt about the answer. While 'any member may request at any time reconsideration (*ex nunc*) of an interpretative decision'<sup>1</sup> and while, therefore, a final decision is not final in the sense of being permanent, interpretation is 'binding' upon the Fund and its members: depending upon the constitutional law, an interpretative decision may even have direct binding force upon the municipal authorities, or may render it necessary to adapt municipal law in accordance with Article XX, Section 2 (*a*). The present General Counsel to the Fund, Mr.

<sup>1</sup> Loc. cit. (above, p. 3, n. 4), p. 353.

Joseph Gold, writing in his personal capacity, but with the full force of his authority, experience and legal acumen, is hardly less definite. On the one hand, he states categorically that interpretative decisions under Article XVIII are unquestionably 'binding on member Governments'.<sup>1</sup> Whether such interpretations 'have binding effect on forums in member countries' is a question on which 'there is very little authority'; but, after a long discussion, he answers it in the affirmative. He goes so far as to suggest that 'there can be little doubt that an international tribunal would regard itself as concluded by an interpretation under Article XVIII'.<sup>2</sup> On the other hand, Mr. Gold states elsewhere<sup>3</sup> that finality may 'mean only that no appeal lies from the Board of Governors to some other body, whether within or outside the Fund', and that the Articles of Agreement do not preclude the reversal by the Executive Directors or the Board of Governors of past interpretations. He also seems to admit<sup>4</sup> that an interpretative decision is subject to clarification and reinterpretation, and probably also to reversal or variation.<sup>5</sup>

It is not intended to suggest that the conclusions reached by these two experts are altogether wrong. The suggestion is that the point requires some elaboration and clarification which will throw a different light upon it.

In assessing the meaning of 'finality' it is material to appreciate the fact of paramount importance that the text of Article XVIII makes no reference whatever to the decision's being binding or conclusive, although municipal law is very familiar with the juxtaposition of the words 'final and conclusive'. If it is suggested that a word such as 'binding' is to be implied, it would be difficult to appreciate the rules of construction which permit or require the proposed implication into the text of the Articles of Agreement. If it is suggested, on the other hand, that even without the implication of any terms, 'finality' as such and standing alone means conclusiveness or binding force, either upon member States or upon municipal authorities, or upon international tribunals, then this would require much further analysis. Nor is it possible to agree with Professor Hexner, who suggests

<sup>1</sup> Gold, *op. cit.* (above, p. 2, n. 1), p. 32.

<sup>2</sup> *Ibid.*, p. 47.

<sup>3</sup> *Ibid.*, p. 29.

<sup>4</sup> *Ibid.*, pp. 26-31.

<sup>5</sup> Very little discussion of the point is to be found in the books. Learned authors who deal with it do so by stating a conclusion rather than submitting any argument. Thus, Professor O'Connell, *International Law* (1965), vol. 2, p. 1107, simply states that members are bound by the interpretation. Professor Seidl-Hohenveldern, *Das Recht der Internationalen Organisationen* (1967), No. 1614, reports that the Governors claim 'the right to authentic interpretation'. These, so he continues, are often disguised amendments of the Articles of Agreement. Aufricht, *The International Monetary Fund* (1964), p. 13, suggests in very guarded language that an interpretation under Article XVIII 'may render not only the Fund Agreement as such, but the Fund Agreement as interpreted by the Executive Directors (and/or the Board of Governors) directly binding on member Governments and, where applicable, on private individuals within the jurisdiction of member countries'.

that the word 'decision' in itself implies conclusiveness.<sup>1</sup> This surely goes far beyond the usual and natural meaning of the term.

The *prima facie* meaning of 'finality' is that which Mr. Gold at least considers possible, and which has already been referred to, namely, the exclusion of an appeal or reference from the Board of Governors to some other body. The Articles of Agreement know of no such procedure. The possibility of obtaining advisory opinions of the International Court of Justice arose only under the Charter of the United Nations, promulgated in 1945, and an Agreement made in 1947 between the United Nations and the Fund, and cannot, therefore, throw light upon the construction of a treaty adopted at Bretton Woods in 1944. If, then, there is no procedure by which a decision of the Governors can be questioned, can 'finality' be read as excluding what, *ex hypothesi*, does not exist? In other words, are we not back at the point where the argument turns on the alternative between words being regarded as redundant or given some meaning?

It is suggested that 'finality' does have a definite meaning and function, though it is different from that envisaged by Mr. Gold. It is the inability of the Governors to revoke, whether *ex tunc* or *ex nunc*, the particular answer to the particular question arising between the particular entities which submit it for decision. It is the particular question arising in the particular case that is finally disposed of by a decision which cannot be rescinded and, in this limited sense, is binding. This does not mean that it is impossible to qualify, reformulate or add to a decision once taken. All it means is that the process of clarification cannot lead to the original decision's being reversed or varied. But the decision of the Governors does not constitute an irreversible precedent for other—future—cases.

Finality, so understood, makes good sense, for it avoids the almost absurd consequence that a decision of the Governors could immediately be challenged by a member, possibly the same member, bringing the point once more before the Executive Directors. In particular, this could be done by the Fund itself, which, it will be noted, cannot appeal from the Executive Directors to the Governors, and which, if it is upheld by the former but overruled by the latter, might be tempted to start again. Were it not for the 'finality' of decision it would be possible not only to reconsider the original 'question of interpretation', but also to revoke the original decision. Such results cannot reasonably have been intended. This conclusion is supported by the fact that the decision of the Executive Directors (as opposed to that of the Governors) is not stated to be final.<sup>2</sup> Initially, no member may require the matter to be referred to the Governors. Under

<sup>1</sup> *Das Verfassungs- und Rechtssystem des Internationalen Währungsfonds* (1960), p. 74.

<sup>2</sup> Wengler, *Völkerrecht* (1964), vol. 1, p. 766, realizes that the Executive Directors' decision is not stated to be final. Yet he suggests that it should be clothed with the same finality as the Governors' decision.



the amended text, such a reference must and can only be made within three months from the Executive Directors' decision. If such reference is not made, it is open to a member or to the Fund to bring the point again before the Executive Directors and, on appeal, the Governors may reverse or vary it, and their decision is final. The contrast provided by the finality of the Governors' decision and the transient character of the Executive Directors' decision is striking.

That 'finality' denotes preclusion of rescission is a view strongly supported by the judicial practice in at least one country whose legal system may provide a helpful analogy. A learned writer recently summarized it in words which, for present purposes, should be sufficient:<sup>1</sup>

The only practical effects of a finality clause appear to be to take away a right of appeal where one already exists . . . and to preclude a body from rescinding one of its own valid decisions.

## V

If the preceding analysis of 'finality' is accepted, the question remains whether, and in what sense, a decision of the Governors can be said to be 'binding'.

1. The first point to note is that no question of 'finality' or 'binding effect' can arise in regard to a 'decision' by the Executive Directors. Such a decision, in contrast to a decision by the Governors, is not stated to be 'final'. It is true that, according to the 1969 amendment of Article XVIII, a member's time for appeal<sup>2</sup> or for having the question referred to the Governors is three months from the date of the Executive Directors' decision; but the failure to make an appeal probably cannot, in the absence of appropriate words, preclude a member from reopening the question by making a fresh application to the Executive Directors. Their decision, therefore, cannot in any case have any binding force.<sup>3</sup>

2. The next point to note is that the Governors do not possess any exclusive right of decision. There may, it is true, be few other bodies which may be called upon to render an interpretative decision, and these can operate only on rare occasions. Yet, this should not detract from the legal significance of the fact that the jurisdiction to render a decision may arise in a variety of circumstances and be vested in a large number of different bodies, as will appear from the more detailed discussion below.

3. In its most striking form, the problem of the binding force arises where the decision involves the 'obligations' of members, and where the

<sup>1</sup> S. A. de Smith, *Judicial Review of Administrative Acts* (2nd ed., 1968), p. 345.

<sup>2</sup> See the wording of Article XIII, Section 2 (b) (viii).

<sup>3</sup> Aufricht, *op. cit.* (above, p. 10, n. 5), p. 12, states that 'the decision of the Executive Directors is final, unless a member requires that it be reviewed by the Board of Governors'. For the reasons given in the text this is unacceptable. On the points made in the text see Treves (above, p. 4, n. 5), pp. 216-19.

failure to fulfil them under Article XV (2) may lead to ineligibility to use the Fund's resources and eventually to withdrawal. The existence of a failure to fulfil obligations depends on the terms of the Articles of Agreement and their interpretation. It is a question which demands an objective answer. It is, moreover, a question which may receive an objective answer from a truly judicial body, namely, the arbitration tribunal constituted under Article XVIII if 'a disagreement arises between the Fund and a member which has withdrawn', i.e. lawfully withdrawn. A member which asserts that it has fulfilled its obligation and which is eventually held to have done so cannot be compulsorily withdrawn. Its expulsion is unlawful.

The Governors' decision under Article XVIII may have a bearing upon the existence or non-existence of a failure to fulfil obligations. It cannot, however, alter or increase the member's obligations. If it purported to do so, it would be *ultra vires*. Indeed, only an interpretation which is correct is effective so as to become a permissible step in assessing the obligation of members. An incorrect interpretation cannot be 'binding' so as to preclude a review of the question of the fulfilment of obligations, either by the Fund or the Governors, or, still less, the arbitration tribunal. For these reasons the arbitration tribunal is entitled and may be bound to review the existence or non-existence of obligations and, consequently, the correctness of interpretative decisions. Hence, in the context of Article XV, the Fund and the Governors must always have a similar right and a similar duty.

4. Next, what is the effect of interpretative decisions in the tribunals or before the authorities of a Fund member?

Municipal courts and authorities are organs of the State, and, as a matter of public international law, bound by such international duties as are imposed upon the State. In the case of the Articles of Agreement, this point is emphasized by Article XX, Section 2 (a), according to which each member is bound to take 'all the steps necessary to enable it to carry out all of its obligations under this Agreement'. It is clear, therefore, that the duties of the State and its organs do not exceed the scope of what can truly be described as the 'obligations under this Agreement'. It follows that if and in so far as the interpretative decision is inconsistent with the Articles of Agreement, and therefore incapable of imposing duties upon a member, the member as well as its organs have no obligation to follow it.<sup>1</sup> No doubt they will consider and examine it. Indeed, they will give great weight to it, and experience has shown that, in certain countries where the general law permits it, the courts have gone very far in having regard to interpretative decisions, and even to views expressed by the Legal Department of the Fund.<sup>2</sup> One should not, however, read too much into incidental remarks

<sup>1</sup> Nussbaum, *Money in the Law* (1950), p. 529, agrees.

<sup>2</sup> See Gold, *op. cit.* (above, p. 2, n. 1), p. 46.



which a court makes, or could—but did not—make. Nor should one attach any significance to the mere reference by a court to the Executive Directors' or even the Governors' interpretation. Such a reference cannot fairly be said to support the 'implication' that the court considered itself bound. And a lower court's decision which on appeal is reversed can only rarely claim any right to survival at all. Still less should it be suggested that a court which refrains from mentioning any Fund's interpretation, but whose decision happens to be in line with it, disregarded it because the court felt it 'unnecessary' to raise the question of its binding force.<sup>1</sup> Such reasoning, it is submitted, is artificial and unconvincing. In the United States, it is true, the Federal Communications Commission treated an interpretative decision as binding,<sup>2</sup> and a decision of the Court of Appeal of Louisiana (4th Circuit),<sup>3</sup> even adds an *obiter dictum* to the effect that an interpretative decision of the Fund is 'binding on all its members'. But these are hardly observations which may claim to originate from close analysis or to carry such authority as to add much to the discussion.<sup>4</sup> They cannot affect the conclusion that the theory of the binding force of the Executive Directors' or even the Governors' interpretation rests on so insecure a foundation that it should be abandoned. They cannot alter the fact that the Governors' decision, even if it were capable of being binding at all, cannot possibly bind except to the extent to which, on investigation, it appears to conform to and express the members' obligations embodied in the Articles of Agreement.

The point can be put slightly differently. It is the Agreement itself which alone is binding. There is nothing in the Agreement which confers upon the Governors the exclusive right of decision. On the contrary, the correctness of the interpretative decision will, if necessary, be decided by the arbitration tribunal. Admittedly, a member and the Fund's organs which ignore the interpretative decision run the risk that the arbitration tribunal will disagree with them and find a failure to fulfil an obligation. This is a risk which the member and its organs must take, but they also take the risk inherent in the opposite attitude: they may follow an interpretative decision; in the case of some other member which fails to observe it or in some other circumstances the arbitration tribunal is called upon to consider it and expresses disapproval; in following the original interpretative decision the member would have committed a breach of obligation.

5. The remaining question is: what attitude should the international

<sup>1</sup> See Gold, *op. cit.*, p. 41.

<sup>2</sup> *Ibid.*, p. 33.

<sup>3</sup> *Theye y Ajuria v. Pan American Life Insurance Company*, 154 So. 2d 450 (1963), reversed 161 So. 2d 70 (1964).

<sup>4</sup> The view put forward in the text seems to be in line, for instance, with Seidl-Hohenveldern, *Osterreichische Zeitschrift für öffentliches Recht*, 8 (1957), pp. 90 et seq.

tribunal adopt? This may arise when the International Court of Justice is asked for an advisory opinion, or when a dispute between two States who are members of the Fund comes before an international tribunal of their own choice, and the effect of a decision under Article XVIII is in issue.

It is difficult to see the basis for the view, so unhesitatingly expressed by Mr. Gold,<sup>1</sup> that the international tribunal would be precluded from independent investigation of the problem of interpretation. All that has been urged in the course of the preceding observations tends to establish that there is no such basis, and that, in particular, it cannot be derived from the words 'whose decision shall be final' which are applicable to Governors' decisions only. Even if all the preceding submissions proved to be wrong, the contention now under consideration according to which international tribunals, including those set up under Article XVIII (c), are bound 'by an interpretation under Article XVIII' (i.e. apparently also Executive Directors' decisions) cannot meet with approval, for it overlooks an additional point of some importance.

There is much evidence to support the submission that, according to the practice of numerous States, the 'finality' of a non-judicial decision hardly ever precludes it from being reviewed by a competent judicial body. If the interpretative decision as an administrative act were to bind the Fund and its members, this could only be so pending a decision of an international tribunal.

In England and the British Commonwealth of Nations it has been the law for centuries that, notwithstanding a 'finality' clause in any enactment, the courts, by virtue of the prerogative writs, can review the legality of any Act other than the judgment of a superior court.<sup>2</sup> The law in the United States of America seems to be similar<sup>3</sup> and is illustrated by such landmark cases as *Estep v. United States*<sup>4</sup> where Mr. Justice Douglas on behalf of the majority of the court said:<sup>5</sup>

The provision making the claim of the local Boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the Courts are not to weigh the evidence to determine whether the classifications made by the local Boards are

<sup>1</sup> Op. cit. (above, p. 2, n. 1), p. 47.

<sup>2</sup> For present purposes, it must be sufficient to refer to S. A. de Smith, *Judicial Review of Administrative Acts* (2nd ed., 1968), pp. 340 et seq., and such cases as *R. v. Medical Appeal Tribunal*, [1957] 1 Q.B. 574, where a decision of the Medical Appeal Tribunal under the National Insurance (Industrial Injuries) Act, 1946, described in the Act as 'final' was liable to be set aside if it disclosed an error of law, and *Anisminic Ltd. v. The Foreign Compensation Commission*, [1969] 2 W.L.R. 163, the most recent decision of the House of Lords.

<sup>3</sup> See generally, L. L. Jaffé, 'The Right to Judicial Review', *Harvard Law Review*, 71 (1958), pp. 401, 769, 786-90. And see Bernard Schwartz, *An Introduction to American Administrative Law* (2nd ed., 1962), pp. 175-8 (an administrative decision 'is not final in the sense that courts cannot do anything about it').

<sup>4</sup> 327 U.S. 114 (1945).

<sup>5</sup> Ibid., at 122.

justified. The decisions of the local Boards made in conformity with the regulations are final, though they may be erroneous. The question of jurisdiction of the local Board is reached only if there is no basis in fact for the classification which it gave the registration.

Finally, the same rule prevails, for instance, in France, where it is well established that even express words do not preclude judicial review of legality.<sup>1</sup>

It is, therefore, no exaggeration to suggest that, on full inquiry which cannot be made in the present context, it may well appear to be a general principle of law that a competent tribunal is not precluded from reviewing the legality of a decision said to be 'final'.

Such a conclusion is in no way contradicted and may, on the contrary, be supported by a dictum of the International Court of Justice which said of a tribunal 'established, not as an advisory organ or a mere subordinate committee of the General Assembly of the United Nations, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions' that, according to a generally recognized principle of law, 'a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute'.<sup>2</sup> The idea of binding force and finality outside the realm of judicial decisions clearly did not seem worthy of consideration to the International Court.

## VI

The results of the preceding discussion may be summarized as follows:

1. Any decision of the Executive Directors or the Governors which fulfils the conditions contemplated by Article XVIII is a decision under Article XVIII, whether or not it is so described or is intended as such.
2. The powers of interpretation conferred by Article XVIII relate only to 'the interpretation of the provisions of' the Articles of Agreement, and do not extend to a decision on questions of fact or public international law, or permit what, in effect, is an amendment of the Articles.
3. Neither the Executive Directors nor the Governors acting under Article XVIII do so in a judicial capacity.
4. An interpretative decision of the Executive Directors, even after expiration of the time limit for a reference to the Governors, is not in any sense final.
5. An interpretative decision of Governors rendered as a result of a reference by a member (not the Fund) is 'final' in the sense that it cannot be rescinded or varied except by the legislative process under Article XVII.

<sup>1</sup> Bernard Schwartz, *French Administrative Law and the Common Law World* (1954), p. 157.

<sup>2</sup> *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, I.C.J. Reports, 1954, p. 47, at p. 53.



6. Neither the Executive Directors nor the Governors have the exclusive right or duty of deciding a question of interpretation.

7. An interpretative decision by the Governors which is erroneous in law is not binding upon members in the sense of affecting their respective obligations.

8. The question whether or not an interpretative decision by the Governors is or is not legally correct may freely be considered and pronounced upon—

- (a) by any international tribunal having jurisdiction, such as the arbitration tribunal under Article XVIII (c), the International Court of Justice in case of a reference for an advisory opinion, or any tribunal appointed by treaty between members;
- (b) by any municipal tribunal, provided its decision does not constitute a breach of obligation within the meaning of Article XV (which in the last resort arbitrators under Article XVIII (c) will have to decide).

These conclusions lead to four further implications which need a few explanatory words.

First, the suggestions made in this article are likely to provoke the comment that both in content and tendency they reduce the self-regulating powers of an international organization as represented by its bureaucracy. This is correct, but should, it is believed, be welcomed by all. The treaty setting up the Fund or a similar international organization should be seen as a fundamental law creating a legal order. In other words, it is the law, rather than expediency, which should be treated as the paramount guide. The opportunities of largely discretionary decision should be curtailed in the sphere of international law no less than in that of municipal law.

Secondly, it has been suggested that in the case of the Fund and certain other international organizations, most questions of interpretation involve matters of so technical and specialist a nature that it is difficult or undesirable to submit them to the decision of any body of persons other than experts. It is quite true that technical points are best decided by technicians; the trade arbitrations under the arbitration provisions of trade associations such as the London Metal Exchange are based on this elementary principle. But just as such arbitrators are not qualified to decide questions under the Sale of Goods Act, or questions of construction arising under the contract of the parties or the constitution of the Exchange, so in the case of the Fund technicians are not qualified to decide legal questions. There is, therefore, no justification for concluding that both types of question are most efficiently decided by the same body of persons. On the contrary, it is the duty of the lawyer to draw attention to the distinctiveness of function and, accordingly, of qualification, and to insist that legal questions should

be decided by lawyers. Admittedly, the Fund's Articles of Agreement do not draw the distinction. On the other hand, it does not follow that the Articles of Agreement should be interpreted as if it did not exist.

Thirdly, it may be said that the Articles of Agreement should be viewed as a constitution and that, for this reason, they should be interpreted and developed with the breadth and liberality which, in countries such as the United States of America, has been characteristic of constitutional law. One may even quote Lord Radcliffe who, so he tells us,<sup>1</sup> often thought 'that far back in our history a very great mistake was made when people tried to express legislative enactments in the form of precise rules of law. Statutes, whatever the refinements of their drafting, should be ideas of law, not law itself'. Even if this thought could be injected into public international law in general, it should not alter the approach towards the Fund's Articles of Agreement. Constitutional texts or statutes as 'ideas of law', lend themselves to broad and flexible interpretation only where there is a judicial process which continuously functions to supervise and check, to expand and to confine. Where, as in the case of the Fund, such a process is missing, traditional methods of treaty interpretation cannot be dispensed with.

Fourthly, it is not intended to deny that acquiescence by member States may have particularly far-reaching effects in the context of an international organization's internal law.<sup>2</sup> As Mr. Fawcett has aptly said,<sup>3</sup> the very absence of direct judicial control 'creates habits and, indeed, a state of mind in an organization which militate against the use of the judicial process even when it is available'. There develops in various respects what one may describe first as an *esprit de corps*, then as a practice and, finally, as binding custom. Nothing said in this article is intended to deny the potentiality or the formative strength of acquiescence, practice, custom or whatever term one may employ to indicate actual or implied consent by conduct. It will be a matter of evidence, depending on the circumstances of each case, to decide whether the results to which the strictly legal interpretation of the Fund's Articles of Agreement *prima facie* leads are displaced by the conduct of members. The decision may be different in the case of different members. This is a circumstance that underlines the necessity for starting from the treaty, its text and its meaning. Thereafter, as a next step, it will be possible to investigate whether and to what extent a secondary rule of practice has emerged. Finally it may be appropriate to ask whether, at least in respect of certain members or even a single member, acquiescence will not operate so as to preclude the reopening of a point of

<sup>1</sup> *Not in Feather Beds* (1968), p. 272.

<sup>2</sup> E. Lauterpacht, 'The Legal Effect of Illegal Acts of International Organizations', in *Cambridge Essays in International Law in Honour of Lord McNair*, p. 88, at p. 117.

<sup>3</sup> *This Year Book*, 36 (1960), p. 327.



interpretation. Unfortunately, once again, these are questions which it will often be difficult to answer in the absence of a judicial process. No doubt on occasion they may require an answer opposed to some of the suggestions made or implied in this article. At present it can only be said that no attempt to displace them by reference to the Fund's practice or custom of a binding nature has yet been made.



# THE UNITED NATIONS COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS\*

By A. H. ROBERTSON, B.C.L., LL.M., S.J.D.

## I. INTRODUCTION

WHEN the General Assembly of the United Nations adopted the Universal Declaration of Human Rights on 10 December 1948, it considered this historic text as the first part of an International Bill of Rights. The second part would consist of a convention which would transform the principles stated in the Universal Declaration into legal obligations; and the third part would contain 'measures of implementation' or international machinery to secure the effective observance of these obligations.<sup>1</sup>

The year 1968 was observed as International Human Rights Year, because it was the twentieth anniversary of the adoption of the Declaration, and the General Assembly decided to take this opportunity of passing in review the results of twenty years' work of the United Nations for the protection of human rights and adopting a new programme of action for the future.<sup>2</sup> Warm tributes have been paid to the Universal Declaration in many quarters, particularly at the International Conference on Human Rights in Teheran in April and May 1968. On that occasion U Thant was able to say that forty-three national constitutions adopted in recent years are clearly inspired by the Universal Declaration and quite often reproduce its provisions textually.<sup>3</sup>

On an earlier occasion another eminent authority expressed the view that the constant widespread recognition of the principles of the Universal Declaration, in conventions and declarations of the United Nations and the Specialized Agencies and in national constitutions, clothes it in the character of customary law.<sup>4</sup>

In the meantime, the original plan for an International Bill of Rights has been carried out, but with variations both as to its content and its title. In 1952 the General Assembly decided that two instruments should

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<sup>1</sup> Resolution 217A (III) of 10 December 1948.

<sup>2</sup> Resolution 2081 (XX) of 20 December 1965.

<sup>3</sup> *Final Act of the Teheran Conference*. U.N. Doc. A/CONF. 32/41, p. 37.

<sup>4</sup> Sir Humphrey Waldock, 'Human Rights in Contemporary International Law and the Significance of the European Convention', *International and Comparative Law Quarterly* (1965), Supplement No. 11, p. 15.

be prepared, separate but simultaneously, one dealing with civil and political rights, the other with economic, social and cultural rights;<sup>1</sup> subsequently, it was agreed that the 'measures of implementation' should be elaborated at the same time as the substantive texts and that they should be included in the same, or related, instruments. The Commission on Human Rights submitted drafts to the General Assembly in 1954. They were under discussion and revision in the Third Committee for twelve years. The final outcome was the adoption by the General Assembly on 16 December 1966 of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol to the latter.<sup>2</sup>

In Europe, meanwhile, the situation had developed more rapidly. In May 1948 (six months before the adoption of the Universal Declaration), the Hague Congress had called for a 'Charter of Human Rights, guaranteeing liberty of thought, assembly and expression, as well as the right to form a political opposition' and for the creation of a 'Court of Justice with adequate sanctions for the implementation of this Charter'.<sup>3</sup> In August 1949 the Consultative Assembly of the Council of Europe proposed to the Committee of Ministers the conclusion of a Convention on Human Rights and submitted a detailed draft.<sup>4</sup> Revised texts were prepared by two separate committees of governmental experts and submitted to the ministers. After the Assembly's opinion had been obtained in August 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome on 4 November 1950.<sup>5</sup> Two Protocols to the Convention adding further rights to the original list were signed in 1952 and 1963;<sup>6</sup> other Protocols have been concluded, dealing with certain matters of procedure and conferring on the Court the competence to give advisory opinions.<sup>7</sup>

The year 1968 marked the fifteenth anniversary of the entry into force of the European Convention. Sixteen States were then Parties to it.<sup>8</sup> Eleven of them have accepted the right of individual petition to the European Commission of Human Rights and the compulsory jurisdiction

<sup>1</sup> Resolution 543 (VI); General Assembly, sixth session, plenary meeting 375.

<sup>2</sup> Resolution 2200 (XXI). Cf. E. Schwelb, 'Some Aspects of the International Covenants on Human Rights', *Nobel Symposium*, 7 (1968), pp. 103-29.

<sup>3</sup> A. H. Robertson, *Human Rights in Europe* (1963), p. 7.

<sup>4</sup> Recommendation 38, *Texts Adopted by the Assembly*, 1949.

<sup>5</sup> *Yearbook of the Convention on Human Rights*, 1 (1955-7), pp. 4-36. For an account of the negotiations, see A. H. Robertson, 'The European Convention on Human Rights', this *Year Book*, 27 (1950), pp. 145-63.

<sup>6</sup> *Yearbook of the Convention*, 1 (1955-7), pp. 36-8; *ibid.*, 6 (1963), pp. 14-18.

<sup>7</sup> Second and Third Protocols, *ibid.*, 6 (1963), pp. 2-10; Fifth Protocol, *ibid.* 8 (1965), pp. 2-6.

<sup>8</sup> In October 1968 the Swiss Government proposed to the Federal Council the ratification of the Convention, subject to five reservations, and the acceptance of both the optional provisions (the right of individual petition and the compulsory jurisdiction of the Court).

of the European Court of Human Rights. A number of them accept the principle that its provisions not only constitute obligations in international law but also are directly binding in internal law and are thus the source of rights and obligations enforceable by national courts.<sup>1</sup> It is thus only natural that the Parties to the European Convention should compare the United Nations Covenants with the European text and examine the question of ratification of the former in the light of their experience of the latter. Such an examination is necessary not only in order to consider *in abstracto* the nature of the obligations which States will assume by ratifying the United Nations Covenants, but also in order to determine questions of practical importance, such as which rules will apply in the internal law of States which accept the direct applicability of treaties which they have ratified; and which international forum will be competent to adjudicate in cases of alleged violation of rights which are protected both by the United Nations Covenants and the European Convention.

The problems which arise concern all States which are Parties to the European Convention and, to a lesser extent, States which may become Parties in the future. Since it is a common problem, it was natural that a joint study should be undertaken. Measures which will provide a solution to the problems raised for one State will do so equally for another. Consequently, it was desirable that a common attitude should be adopted, if possible, by the Parties to the European Convention as regards ratification of the United Nations Covenants and as regards any special arrangements which might be necessary to safeguard the European system. As a result, the Committee of Ministers of the Council of Europe decided that such a study should be undertaken. Now, the European Commission of Human Rights consists—like the Court, but unlike the Commission on Human Rights of the United Nations—of persons who sit in their individual capacity and not as representatives of their governments. But a body of governmental representatives to deal with problems relating to human rights has also been found necessary in the Council of Europe for various purposes, including the drafting of the various Protocols to the Convention,<sup>2</sup> and of other international texts on human rights matters.<sup>3</sup> In 1960 the Ministers set up the body known as the Committee of Experts on Human Rights, consisting for the most part of lawyers from the government

<sup>1</sup> This applies (with certain variations) to Austria, Belgium, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands. See T. Buergenthal, 'The Effect of the Convention on the Internal Law of Member States', *International and Comparative Law Quarterly* (1965), Supplement No. 11, pp. 80-94; W. J. Ganshof van der Meersch, 'Does the Convention have the Force of *ordre public* in Municipal Law?', *Human Rights in National and International Law* (1968), pp. 102-3.

<sup>2</sup> The Second to Fifth Protocols mentioned above, p. 22, nn. 6 & 7.

<sup>3</sup> e.g. the Agreement on Persons Participating in Proceedings of the Commission and Court of Human Rights, opened for signature on 6 May 1969.



departments (usually the Foreign Ministry or the Ministry of Justice) dealing with human rights matters; its function is that of the *promotion* of human rights, while that of the Commission and the Court is their *protection*.<sup>1</sup> It was naturally this body which was chosen to make the study that was required of the problems arising from the co-existence of the European Convention and the United Nations Covenants.<sup>1</sup>

The problems which arise may be divided broadly into two categories: those which concern the rights guaranteed and those relating to the machinery for their enforcement—or, in other words, questions of substance and questions of procedure. It is proposed to consider these separately. First of all, however, some consideration will be given to the general nature of the obligations undertaken by the High Contracting Parties. This study will be limited to the provisions of the Covenant on Civil and Political Rights and its Optional Protocol, on the one hand, and the European Convention on Human Rights and its First and Fourth Protocols, on the other hand. A similar study comparing the Covenant on Economic, Social and Cultural Rights with the European Social Charter is also called for, but will not be included in this article.

## II. THE GENERAL NATURE OF THE OBLIGATIONS CONTAINED IN THE TWO INSTRUMENTS

The basic obligation resulting from the ratification of each treaty is set out *in limine*. Article 1 of the European Convention reads as follows: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' Article 2 of the United Nations Covenant (the first article will be considered in the next section) starts off with a 'non-discrimination clause'. Each Party undertakes to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The European Convention equally contains a non-discrimination clause on similar lines, and adds another ground on which discrimination is possible but prohibited: 'association with a national minority'; moreover, it uses the word 'discrimination' and not the more general term 'distinction'.<sup>3</sup>

<sup>1</sup> Cf. K. Vasak, 'Institutions for the Promotion and Protection of Human Rights', *Human Rights Review*, 2 (1968), pp. 165, 171.

<sup>2</sup> The present author having participated in the work of this Committee, this article reflects a number of the problems which it discussed; any views expressed, however, should be considered as his own.

<sup>3</sup> There would not appear to be any difference in the meaning of the terms 'distinction' and 'discrimination' in this context, particularly as the French text in both cases is the same: *sans*

This clause in the European text comes much later, however, in Article 14. The placing of the non-discrimination clause of the Covenant right at the beginning obviously reflects the well-known concern of the United Nations with this problem.

While these provisions are identical (with the exception already noted) as regards the prohibition of discrimination, there is a difference to be noted as regards the scope of application of the undertaking. The obligation in the European Convention is for the Parties to secure the rights and freedoms guaranteed 'to everyone within their jurisdiction'; in the United Nations text the phrase is 'within its territory and subject to its jurisdiction'. The requirement that an individual, in order to benefit from the provisions of the treaty, must be within the territory of the State concerned is an additional limitation not found in the European text. The Convention has been invoked in favour of a person who claimed that his rights were violated by a consular officer abroad<sup>1</sup> and by a person who was refused a visa to enter the territory of the respondent State in order to take part in legal proceedings there.<sup>2</sup> While such cases may be rare, they show that the scope of the European Convention is wider.

A greater difference is apparent when we come to examine the second paragraph of Article 2 of the Covenant. The point at issue here is so fundamental to the whole question of the nature of the obligations resulting from the Covenant that this paragraph should be quoted in full. It reads as follows:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

When this text is compared with Article 1 of the European Convention (quoted above) the contrast is immediately apparent. Where the European Convention establishes obligations of immediate application which are in many countries (as we have seen) directly enforceable in municipal law, the United Nations Covenant does no more than impose on States an obligation 'to take the necessary steps, in accordance with [their] constitutional processes . . . to adopt such . . . measures as may be necessary . . .'. The basic conception is quite different. The Covenant will not necessarily have a direct effect on the national legal systems. It is possible for States to ratify it without immediately complying with the obligations it

*distinction aucune.* Cf. 'The Judgment of the Court of Human Rights of 23 July 1968, on the merits of the 'Belgian Linguistics Case', paragraph 10.

<sup>1</sup> Application No. 1197/61, *Yearbook of the Convention on Human Rights*, 5 (1962), p. 88.

<sup>2</sup> Application No. 172/56, *ibid.*, 1 (1955-7), p. 211.

contains, provided that they have the intention of doing so in the future; but there is no time-limit for doing so. Certain proposals were made during the negotiations to insert a limiting phrase such as 'within a reasonable time'; but they were not adopted. The Covenant is based on the principle of 'progressive realization'. That may well be necessary or desirable in the world-wide framework of the United Nations; but it represents a fundamentally different legal approach from that adopted by the Council of Europe.

It is, of course, natural that a text drafted to suit the requirements of more than a hundred States, members of the United Nations, should be less stringent in the obligations it imposes than one which can be accepted by the States of Western Europe. It is obvious that a number of newly independent States cannot give immediately guarantees of civil liberties which have required several centuries of development before they became effective as we know them in the Western world today. It is no criticism of the United Nations text to show that the obligation involved is weaker, but it is a necessary part of the legal analysis; recognition of this fact may, indeed, go far to facilitate ratification.

The second major point to be made as regards the nature of the obligations resulting from the two instruments is that the system of control is quite different in its nature. This matter will be examined in greater detail in the third part of this article, but the point should be borne in mind throughout this study. Whereas the European Convention provides for decisions on alleged violations to be taken by the Court of Human Rights or the Committee of Ministers of the Council of Europe, after the Commission has expressed its opinion, the United Nations Covenant provides for a reporting system by States and then (for those States which have accepted its optional provisions) an exchange of written communications about alleged violations, possibly the appointment of an *ad hoc* Conciliation Commission to deal with inter-State complaints, and summary reports to the General Assembly. In other words, there is no provision leading to the judicial determination of the existence (or the absence) of a violation. Consequently, States which ratify the Covenant after having satisfied themselves that their law is generally in accordance with its provisions but which may have some doubt about this in a marginal case, possibly on account of uncertainty about the exact meaning of the United Nations provision (some cases where this might occur are mentioned in the next section) do not need to fear the possibility that an international judicial body may decide that they are guilty of a violation of their obligations. No such power is conferred by the Covenant on the United Nations Human Rights Committee or on the Conciliation Commissions which may be set up under Article 42 thereof. The principal result of examination



of a complaint by the United Nations machinery will be an exchange of correspondence between the United Nations organs and the foreign ministry of the State concerned. As a result, governments will not be exposed, in cases of doubt, to the unpleasant consequences which would result from a judicial determination of violation of an international obligation.

Before proceeding to consideration of the rights guaranteed in the Covenant, two important differences should be noted in the rules relating to derogation. Article 4 of the Covenant is broadly similar to Article 15 of the Convention; each permits derogation 'in time of public emergency which threatens the life of the nation . . .'. The Covenant, however, is more restrictive than the Convention as to the exercise of this right in two respects. First, it requires that the public emergency shall be 'officially proclaimed'; this contains an additional guarantee not found in the Convention. Secondly, the Convention lists four rights which may not be suspended even in time of public emergency: the right to life (except as regards deaths resulting from lawful acts of war); freedom from torture and inhuman treatment; freedom from slavery or servitude; and protection against retroactivity of the criminal law. Article 4 of the Covenant adds three others to the list of 'sacrosanct rights': freedom from imprisonment for civil debt, the right to recognition as a person before the law and the right to freedom of thought, conscience and religion. In this respect also the Covenant affords additional safeguards.

### III. THE ENUMERATION AND THE DEFINITION OF THE RIGHTS GUARANTEED

The European Convention and its Protocols protect nineteen separate rights: twelve in the Convention (Articles 2 to 13), three in the First Protocol<sup>1</sup> and four in the Fourth Protocol.<sup>2</sup> The United Nations Covenant on Civil and Political Rights protects twenty-three rights, set out in Article 1 and Articles 6 to 27. (Articles 2 to 5 contain provisions of general application rather than statements of rights.)

As might be expected, a number of the rights protected by the two instruments are the same and their definitions are substantially similar. This is all the more natural since work on the Covenant had already begun before the European Convention was prepared; as a result, those who worked on the drafting of the latter in the spring of 1950 had available—and made use

<sup>1</sup> The First Protocol was concluded on 20 March 1952. It has been ratified by all sixteen Parties to the Convention.

<sup>2</sup> The Fourth Protocol was concluded on 16 September 1963. By 1 July 1969 it had been ratified by Denmark, the Federal Republic of Germany, Iceland, Ireland, Luxembourg, Norway and Sweden.



of—the work already done at that stage by the United Nations Commission.

But if many of the definitions are substantially the same, there are other cases where the same rights are included but the definitions differ substantially, and these differences have considerable importance for States which are—or may become—Parties to both instruments. It is necessary for them to consider whether the obligations they will assume under the United Nations Covenant are more or less extensive than those already assumed under the European Convention and, if they are more extensive, whether their national law is in conformity therewith. This aspect of the matter is of particular importance for those countries in which a treaty, once ratified, is directly applicable in internal law: if a second and different treaty provision relating to the same right now becomes binding on the national courts, which are they to apply? Is it a question of *lex posterior derogat legi priori*? Are the provisions of the United Nations Covenant in themselves 'self-executing'?<sup>1</sup>

A third category is constituted by those rights which are provided for in the United Nations Covenant but not in the European Convention, or vice versa. This might seem a simple situation where no problem would arise. But, as will be seen, it is less simple than would at first appear, because in some cases rights which are not expressly included in the Convention are implicitly covered by other provisions; in other cases they are covered by other conventions concluded under the auspices of the Council of Europe to which many of the same States are Parties.

It is now proposed to consider these three categories of rights successively.

#### *A. Rights included in both instruments in substantially similar terms*

There are eleven rights included in both instruments in substantially similar terms. They are the following (the reference given in each case being to the article in the United Nations Covenant by which the right is protected):

Freedom from torture and inhuman treatment (Article 7).

Freedom from slavery, servitude and forced labour (Article 8).

The right to liberty and security of person (Article 9).

Freedom from imprisonment for failure to fulfil a contractual obligation (Article 11).

The right to freedom of movement (Article 12).

Protection against retroactivity of the criminal law (Article 15).

<sup>1</sup> Cf. F. Capotorti, 'Possibilities of Conflict in National Legal Systems between the Convention and other International Agreements', *Human Rights in National and International Law* (1968), pp. 72–93.

The right to privacy (Article 17).

The right to freedom of thought, conscience and religion (Article 18).

The right to freedom of expression (Article 19).

The right of peaceful assembly (Article 21).

The right to freedom of association (Article 22).

When it is said that these rights are defined in substantially similar terms, this is not meant to conceal the fact that in some cases there are differences in the definitions which may have some importance. Thus, as regards the right to liberty and security of person, Article 9 of the United Nations Covenant prohibits 'arbitrary arrest or detention', while Article 5 of the European Convention prohibits arrest or detention except in six sets of circumstances which are specifically defined (after conviction by a competent court, for non-compliance with the lawful order of a court, etc.). The question thus arises whether there is a correspondence between the prohibition of 'arbitrary arrest or detention' and the more carefully defined European formula. It appears that 'arbitrary' is intended to mean 'unlawful and unjust'<sup>1</sup> and that it would thus prohibit arrest or detention which might be permitted under some systems of law but which, by international standards, would not be considered 'just'. This could hardly be the case, however, with the six cases permitted by Article 5 of the European Convention<sup>2</sup> so that, even though the two definitions are not identical, no conflict should arise.

As another example, the United Nations text (Article 9, paragraph 2) requires that a person arrested shall be informed of the reasons 'at the time of his arrest', while the European requirement is that he should be informed 'promptly'. The requirement of the Covenant may be considered as imposing a stricter obligation; nevertheless, it appears that the intention—and the consequential obligation—is much the same, so that the conclusion seems justified that these rights are defined in 'substantially similar terms'.

Other examples of such differences even when the definition is substantially similar relate to the prohibition of retroactivity of the criminal law, where the United Nations text—Article 15 of the Covenant—contains a provision, which is not found in the European Convention, to the effect that an offender shall benefit from a change in the law, after the commission of the offence, imposing a lighter penalty; as regards the right to privacy,

<sup>1</sup> Report of the Secretary General of the United Nations on the draft Covenants (cited hereafter as 'U.N. Commentary'), Doc. A. 2929 of 1 July 1955, Chapter VI, paragraph 3.

<sup>2</sup> The six cases are: arrest or detention of a person after conviction by a competent court; for non-compliance with the lawful order of a court; on reasonable suspicion of having committed an offence or to prevent his committing an offence or fleeing after having done so; for the educational supervision of a minor; of persons of unsound mind, alcoholics, drug addicts or vagrants or for the control of infectious diseases; with a view to deportation, extradition or prevention of unauthorized entry.

where both texts protect privacy, family, home and correspondence, but the United Nations text also protects 'honour and reputation'; as regards freedom of thought, conscience and religion, where the European text includes freedom to 'change one's religion or belief' which is not mentioned, but is implicit, in the United Nations Covenant; and as regards the right to freedom of expression, where the United Nations text includes the right 'to seek . . . information', which is not included in the European Convention and could be of great importance for journalists. The value of this provision, however, may be less than could be expected, since restrictions are permitted 'for the protection of national security or of public order (*ordre public*)' which could be interpreted very widely. These differences are small, however, when compared with those which will be considered in the following section.

*B. Rights with regard to which there are important differences in the definitions*

In this section it is proposed to consider four rights:

The Right to Life (Article 6).

The Right to a Fair Trial (Article 14).

The Right of Marriage (Article 23).

Political Rights (Article 25).

*The right to life*

Article 6 of the Covenant protects the right to life. Its first paragraph reads 'Every human being has the inherent right to life.'<sup>1</sup> This right shall be protected by law. No one shall be arbitrarily deprived of his life.' Once again we find that the United Nations text uses the word 'arbitrarily', which was proposed but rejected during the drafting of the European Convention, on the ground that it was too general or vague. The European text states explicitly that 'no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'. It continues by permitting restrictions on the right in the case of death resulting from the use of force which is no more than absolutely necessary in three cases: in defence against unlawful violence; in order to effect arrest or prevent escape; for the purpose of quelling a riot or insurrection.

As in the case of liberty and security, it would appear that the intention and the effect of the two texts is similar, and that the restrictions permitted under the Convention could not be considered 'arbitrary' within the meaning of the Covenant. A borderline case might perhaps arise with

<sup>1</sup> The European Convention reads 'Everyone's right to life shall be protected by law'. The question has been raised whether 'every human being' is wider than 'everyone' and might cover the unborn child; in this case abortion would be contrary to this article.



'action lawfully taken for the purpose of quelling a riot or insurrection'. One could visualize action of this sort which would be quite legal but might result unintentionally in the death of rioters; though lawful, such action might nevertheless be considered 'arbitrary' within the meaning of the Covenant on the ground that the object of the demonstration was just and that the quelling of a resultant riot was 'unjust'. This is, however, a marginal case.

The more important differences are found in the subsequent paragraphs of Article 6 of the Covenant. They are clearly inspired by the conception that the death penalty should be restricted as far as possible and eventually abolished. Paragraph 2 begins 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes . . .' and paragraph 6 states that 'Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the Covenant'. In this respect the Covenant is distinctly more progressive than the European Convention, and one may wonder whether the reintroduction of the death penalty, when it has once been abolished, would be consistent with the Covenant. There are two references to the Genocide Convention, though these hardly constitute a difference of substance with the European text, since genocide is clearly incompatible with the provisions of the latter. A further difference is that the Covenant prohibits the death penalty for persons under eighteen years of age and for pregnant women; it also provides for the right to seek pardon or commutation of the sentence. There are no corresponding provisions in the European Convention, even though the practice of European States is generally in conformity with the requirements of the Covenant. On the whole, therefore, the United Nations text reflects a more liberal spirit than the European Convention and one may hope that its provisions will be widely accepted.

### *The right to a fair trial*

The second Article where one notes important differences from the European text is perhaps (to judge by the European experience and from history) the most important of all: the right to a fair trial or to 'due process of law'. Article 14 of the Covenant starts off with the general affirmation: 'All persons shall be equal before the courts and tribunals.' This is, of course, unexceptionable as a general principle, but is not found in the European Convention, no doubt on account of the uncertainties which may arise as regards its practical application. In certain countries, for example, access to the Constitutional Court is limited to nationals; in others, foreigners are required to deposit a *cautio judicatum solvi*. This difference, however, is probably not of great importance.



The main statement of the right is rather similar in the two instruments. Article 14 of the Covenant provides:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

There are, however, three differences between this text and the corresponding sentence in Article 6 of the European Convention. First, the United Nations text uses the expression 'rights and obligations in a suit at law' whereas the Convention speaks of 'civil rights and obligations'. The European Commission of Human Rights has given much attention to the meaning of this phrase, and many applications have been declared inadmissible on the ground that the rights or obligations involved were not 'civil' within the meaning of this article. When the European Convention was at the drafting stage, it used the phrase 'rights and obligations in a suit at law' which was borrowed from the draft of the United Nations Commission, where its inclusion had been proposed by Mrs. Roosevelt.<sup>1</sup> It was only on the eve of signature that the English version of the European text was changed, in order to bring it into line with the French version. But, whatever the legislative history, it seems clear that these two different formulations are intended to have the same meaning, because the French versions are identical in the two instruments (*droits et obligations de caractère civil*).

The second difference in the two statements of the right to a fair trial is that the European text includes, while the United Nations text omits, a provision to the effect that the hearing must be 'within a reasonable time'. A later paragraph (paragraph 3 of Article 14) of the United Nations text provides that a trial on a criminal charge must take place 'without undue delay', so that both instruments contain this guarantee in criminal matters, but only the European Convention as regards civil proceedings.

The third difference is that both texts provide for hearing by 'an independent and impartial tribunal established by law'. The United Nations text adds the requirement that the tribunal shall be 'competent'. The intention was to make it clear that all persons should be tried by courts whose jurisdiction has been previously established by law and thus avoid arbitrary proceedings;<sup>2</sup> but since this notion is already included or implied in 'independent . . . tribunal established by law' this difference also appears of minor importance.

<sup>1</sup> For the history of this provision, see Frank C. Newman, 'Natural Justice, Due Process and the new International Covenants on Human Rights', *Public Law* (1967), pp. 274-313, at p. 304.

<sup>2</sup> U.N. Commentary, Doc. A. 2929, Chapter VI, paragraph 77.

The second paragraph of Article 14 states the presumption of innocence in terms which are almost identical with those used in the European Convention.

The third paragraph sets out the rights of the defence in criminal proceedings.<sup>1</sup> It is generally similar to Article 6 (3) of the European Convention, but calls for three comments. First, the Covenant stipulates the right of the accused 'to be tried in his presence'. This is not found in the European Convention, though the European Commission of Human Rights has held that the right to be present or to be represented by counsel may be deduced, at least in certain circumstances, from the principle of 'equality of arms', which is fundamental to the notion of a fair trial.<sup>2</sup> Secondly, the Covenant includes the right of the accused to be informed of his right to have legal assistance if he does not already have it; this is not included in the European Convention and is therefore an improvement. Thirdly, the Covenant includes the right of the accused 'not to be compelled to testify against himself or to confess guilt'—the well-known guarantee set out in the Fifth Amendment to the Constitution of the United States.<sup>3</sup> While not expressly covered in the European Convention, it may be thought that this right could equally be deduced from the principle of 'equality of arms'.

The United Nations Covenant then continues with four further paragraphs setting out additional provisions regarding the right to a fair trial; paragraph 4 protecting the special position of juveniles; paragraph 5 on the right of a convicted person to appeal; paragraph 6 on the right to compensation for miscarriage of justice; and paragraph 7 expressing the principle of *ne bis in idem*. None of these points are covered in the European Convention, except that Article 6 thereof contains a provision which authorizes an exception to the general rule about the publicity of trials 'where the interests of juveniles . . . so require'.

Of these four paragraphs, that on the right of appeal would seem to be of particular importance. It reads: 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.' The right of appeal is undoubtedly an important element in the right to a fair trial and is recognized in most developed systems of law as the general rule. The affirmation of this right in Article 14 (5) of the Covenant is therefore valuable. At the same time it may be thought too far-reaching by reason of its very generality. If it means a right of review both as to the law and as to the facts, it could raise considerable problems

<sup>1</sup> Cf., Daniel Harris, 'The Right to a Fair Trial in Criminal Proceedings as a Human Right', *International and Comparative Law Quarterly* (1967), pp. 352-78.

<sup>2</sup> *Pataki and Dunshirn v. Austria*, *Yearbook of the Convention*, 6 (1963), p. 714, at pp. 730-2.

<sup>3</sup> For its history, see Erwin N. Griswold, *The Fifth Amendment Today*, (1955). See also A. H. Robertson, 'Some Reflections on the History of Human Rights', *Mélanges Modinos* (1968), p. 245.

in countries where the decision of the jury on the facts is final. Again, in many systems of law the prosecution has a right of appeal against an acquittal; if such an appeal is successful and the accused is found guilty by the court of second instance, this paragraph would seem to require a further right of appeal for the accused to a third instance. It is perhaps significant that this paragraph was not included in the draft Covenant prepared by the United Nations Commission on Human Rights; it was added by the Third Committee of the General Assembly on the proposal of Israel.<sup>1</sup> In the European framework, the Commission of Human Rights has held that a right of appeal is not guaranteed by the European Convention.<sup>2</sup>

The final paragraph of Article 14 of the Covenant is also important. It is a cause for satisfaction that the rule *ne bis in idem* should be incorporated in an international treaty. It is not found in the European Convention. The European Commission has proposed that it should be added in a Protocol;<sup>3</sup> but this has not in fact been achieved, though it may be included in the European Convention on the International Validity of Criminal Judgments which is now in preparation.

### *The right of marriage*

Article 23 of the Covenant proclaims the right to marry and found a family. In one respect it is less positive than the corresponding article in the European Convention, because it states that the right 'shall be recognised' whereas Article 12 of the Convention provides that men and women of marriageable age 'have the right to marry and to found a family'. In other respects, however, the provisions of the United Nations Covenant are more far-reaching.

In the first place it starts with a general affirmation of principle, comparable to that in a number of national constitutions:<sup>4</sup> 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Secondly, the European text affirms the right 'according to the national laws governing the exercise of this right', and thus incorporates by reference the restrictions on the right, permitted by national law (e.g. in case of insanity or hereditary disease) as regards detained persons, or members of the armed forces.<sup>5</sup> There is no corre-

<sup>1</sup> U.N. Doc. A. 4299 (1959), pp. 16 and 23.

<sup>2</sup> *Yearbook of the Convention*, 1 (1955-1957), pp. 219-22; *Collection of Decisions*, No. 19, p. 71; *ibid.*, No. 22, p. 118.

<sup>3</sup> *Sixteenth Report of the Committee of Ministers to the Consultative Assembly* (1965), Chapter IX, page 76.

<sup>4</sup> e.g. Article 41 of the Constitution of Ireland, 'The State recognizes the Family as the natural, primary and fundamental unit group of Society . . . '.

<sup>5</sup> The Commission has held that restrictions on the right to marry of persons under detention were not contrary to the Convention; Application No. 892/60, *Yearbook of the Convention*, 4 (1961), p. 240, at p. 254.



sponding provision permitting restrictions in the Covenant. Thirdly, the United Nations text continues that 'no marriage shall be entered into without the free and full consent of the intending spouses', which is an additional guarantee not found in the Convention, though it is no doubt secured in fact by the reference to national law. Fourthly—and this is the most important point—the Covenant provides in paragraph 4 of Article 23 for 'equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution'. There is nothing comparable in the European Convention, and it may be difficult for many States to give effect to this provision, since many systems of law do not provide for complete equality in matters of civil status (the nationality or domicile of the wife often follows that of the husband) or as regards maintenance (where there is an obligation on the husband to support the wife but not vice versa).

### *Political rights*

Here again Article 25 of the Covenant is considerably more extensive than Article 3 of the First Protocol to the European Convention. The latter text provides:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

It will be noted that this constitutes an undertaking of States and not an enforceable right of individuals.<sup>1</sup> The United Nations text, on the other hand, provides that 'every citizen shall have the right and the opportunity without . . . distinction . . . and without unreasonable restrictions' to exercise certain activities; these are:

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote and to be elected at genuine periodic elections . . . ;
- (c) to have access, on general terms of equality, to public service in his country.

The Covenant thus covers a number of things not included in the Convention. As regards the right to vote, it is more positive in form and of wider application; it would seem not to be limited to the election of the legislature but also to cover, for example, local elections. The right 'to take part in the conduct of public affairs . . . through freely chosen representatives' is harder to understand. If it means the right to vote, there is no problem; but this is covered by the following paragraph, so it presumably means something else. Does it then refer to the 'conduct of public affairs'

<sup>1</sup> Decision of the Commission on the admissibility of Application No. 1065/61, *ibid.*, p. 260, at p. 268.



by the executive branch of the government? In most countries the citizen does not directly elect the members of the executive—and the same would apply *a fortiori* to the judiciary; its content therefore remains somewhat obscure. The third paragraph on access to the public service on general terms of equality is also something new compared with the European Convention; it is not mentioned therein and the European Commission has rejected as inadmissible applications alleging violation of this right. It will therefore be interesting in future years to follow the manner in which this article is interpreted.

*C. Rights included in the Covenant but not in the Convention or vice versa*

In this section we shall consider eight articles included in the United Nations Covenant but not in the Convention, and then, finally, three which are found in the European system but not in that of the United Nations.

The first article of both Covenants proclaims that 'All peoples have the right of self-determination'. This involves the right to determine freely their political status, to pursue freely their economic, social and cultural development and to dispose freely of their natural wealth and resources. States Parties to the Covenant undertake to promote the realization of this right.

Once more we are confronted with what is clearly a statement of political principle rather than an enforceable right. Indeed, the Third Committee of the General Assembly hesitated for a long time about the inclusion of this article, which had not been proposed by the Human Rights Commission. Its distinct character is evidenced by the fact that it is put at the beginning of each Covenant, as a single article constituting Part I, and not in sequence with the other rights protected.

As a statement of political principle in a very general way, this article is no doubt unexceptionable and generally accepted. But if it is considered as an enforceable right, then it is quite otherwise. The main difficulty arises from its vague and general character. What is meant by 'all peoples'? Who has the right to self-determination? Would the Scottish and Welsh nationalist parties have the right to bring a case against the British Government if it accepts the optional provisions of the Covenant? What of the Alsations, the Bretons and Quebec? What of Biafra—not to mention Czechoslovakia? Do the people of Gibraltar have the right to maintain their present status if they wish, even though some States consider it to be 'colonial'? Clearly there is matter here for plenty of speculation and probably for much argument before the Human Rights Committee once it is created.

A later article, which is the last in Part III of the Covenant (Article 27), deals with 'ethnic, religious or linguistic minorities'. Persons belonging to

such minorities 'shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. This article raises some of the same problems, though it will be observed that the rights are conferred on the 'persons belonging to such minorities' and not on the minority groups as such. One difficulty is the well-known problem of defining the term 'minority'. The Sub-Commission on the Prevention of Discrimination and Protection of Minorities produced a definition as long ago as 1950: 'those non-dominant groups in a population which possess and wish to preserve ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population'; and the Sub-Commission added: 'the members of such minorities must be loyal to the State of which they are nationals.'<sup>1</sup> But this definition has not met with general acceptance by governments and the work of the Sub-Commission in attempting to secure agreement on measures for the protection of minorities has met with little success.<sup>2</sup> The United Nations Commentary on the draft Covenant uses a different definition: 'separate or distinct groups, well-defined and long-established on the territory of a State', excluding groups which would seek to form separate entities within the State.<sup>3</sup> It is probable that this definition will be used for the interpretation of Article 27 of the Covenant.

While there is no corresponding article in the European Convention, the Consultative Assembly of the Council of Europe proposed at one stage that a provision on the rights of minorities should be included in the Fourth Protocol, which was then being drafted.<sup>4</sup> The text then proposed went further than Article 27 of the Covenant, because in addition to the three rights included there relating to culture, language and religion, it added a fourth 'to establish their own schools and receive teaching in the language of their choice'. But the governments did not feel able to accept this proposal<sup>5</sup> and the Fourth Protocol was completed without any reference to the rights of minorities.

The Covenant text is therefore the most positive that we have on this subject. Since its scope is limited to culture, language and religion and

<sup>1</sup> Resolution of the Sub-Commission, quoted in H. Lannung, 'The Rights of Minorities', *Mélanges Modinos* (1968), p. 188.

<sup>2</sup> Sir Samuel Hoare, 'The U.N. Commission on Human Rights', *The International Protection of Human Rights* (1967), pp. 70-6.

<sup>3</sup> U.N. Commentary, Doc. A. 2929, p. 181.

<sup>4</sup> Recommendation 285 of 28 April 1961. For the work of the Council of Europe on the subject of minorities, see H. Lannung, 'The Rights of Minorities', *Mélanges Modinos* (1968), pp. 181-95.

<sup>5</sup> *Sixteenth Report of the Committee of Ministers* (1965), paragraphs 301-2. The 'Case relating to certain aspects of the use of languages in schools in Belgium' was then under consideration by the European Commission of Human Rights. The Court of Human Rights gave its judgment on this case in 1968. *Publications of the Court*, Series A, Judgment of 23 July 1968.

avoids the very difficult subject of the use of languages in schools, we may consider that it represents a modest step in the right direction.

Another provision of the Covenant which has no counterpart in the European Convention is Article 10, which provides that 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person;' it continues by providing for the separation of accused persons from convicted persons and of juveniles from adults; it concludes that the essential aim of the penitentiary system shall be the reformation and social rehabilitation of prisoners. This covers some of the same ground as Article 7 of the Covenant and Article 3 of the Convention, which contain the prohibition of inhuman or degrading treatment, but it goes further because it lays down certain positive standards; indeed, it was to make this clear that the words 'with respect for the inherent dignity of the human person' were added to the text.<sup>1</sup> The principles to be observed in the treatment of prisoners correspond largely to those set out in the 'Standard Minimum Rules for Prisoners' adopted by the United Nations World Congress on the Prevention of Crime and Treatment of Offenders in 1955, many of which have been further elaborated in Council of Europe texts in subsequent years.<sup>2</sup>

The fact remains that Article 10 of the Covenant goes distinctly further, by laying down positive standards, than the mere prohibition of inhuman treatment contained in Article 3 of the Convention. As a result, the interesting situation could arise where an applicant whose case is rejected in Strasbourg, on the ground that the treatment complained of was not inhuman, would nevertheless be able to allege in a communication to the United Nations Committee violation of the higher standards set out in the United Nations text.

Article 13 of the Covenant contains certain procedural safeguards for an alien who is under threat of expulsion. There is no corresponding provision in the European Convention and a proposal to include such a provision was rejected when the Fourth Protocol was being drafted; there might, however, be circumstances in which the expulsion of an alien would be considered as violating another right, for example if it amounted to inhuman treatment or would break up the unity of the family.<sup>3</sup> On the other hand, the European Convention on Establishment of 13 December 1955 does contain somewhat similar safeguards, though these would only apply to the nationals of Contracting Parties.<sup>4</sup>

<sup>1</sup> U.N. Doc. A/4045, paragraph 79.

<sup>2</sup> Resolutions (65) 11 and (66) 25 of the Committee of Ministers on Remand in Custody and Short-Term Treatment of Young Offenders.

<sup>3</sup> Cf. the *Lebeau* case, *Yearbook of the Convention*, 4 (1961), p. 618.

<sup>4</sup> At 1 July 1969 the following States were Parties to this Convention: Belgium, Denmark, the Federal Republic of Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Norway.



Two further articles of the Covenant to be considered in this section are Article 16 on 'the right to recognition everywhere as a person before the law' and Article 26 on equality before the law and the right to the equal protection of the law. Once more we are confronted with provisions which are excellent statements of political principles but lack the precision necessary for legal texts. As a general rule, everyone has the right to recognition as a person before the law, but there are certain exceptions which are quite compatible with the rule of law and with the proper respect for fundamental rights in a democratic society, as in the case of minors and persons of unsound mind. The principle of equality before the law—hallowed, as it is, by its history which goes back to the French Declaration of 1789—is even more difficult of precise application in certain circumstances. The United Nations Sub-Commission is still studying what it means.<sup>1</sup> Broadly speaking, two quite different meanings seem possible: that the substantive provisions of the law should be the same for everyone; or that the application of the law should be equal for all without discrimination.<sup>2</sup> The former interpretation would seem unreasonable; for example, in most countries women are not required to perform military service, while it is unnecessary that the law should prescribe maternity benefits for men. It would seem, therefore, that the meaning is rather to secure equality, without discrimination, in the application of the law, and this interpretation is borne out by the *travaux préparatoires*.<sup>3</sup> The second sentence of Article 26 provides that the law 'shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground . . .'. This, if it stood alone, would constitute an important and far-reaching commitment and a general protection against discrimination. But during the discussions in the Third Committee the words 'in this respect' were added at the beginning of this sentence, on the proposal of Greece and the United Kingdom, so that its scope is now limited to the general statement of equality and equal protection contained in the preceding sentence. As a result, the phrase is, in the view of one expert, largely tautologous.<sup>4</sup>

There are two further provisions of the Covenant which have no counterpart in the European Convention: the prohibition of propaganda for war and of incitement to discrimination; and the statement of rights of the child.

Article 20 of the Covenant provides categorically that 'any propaganda

<sup>1</sup> The U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities has invited a Special Rapporteur to prepare a 'Study of Equality in the Administration of Justice' (E/CN. 4/Sub. 2/289). This was discussed by the Sub-Commission at its 21st session in October 1968 (E/CN. 4/Sub. 2/532-45, pp. 92 et seq.) but the work on the subject is not completed.

<sup>2</sup> Cf. U.N. Commentary, Doc. A. 2929, paragraph 179.

<sup>3</sup> Ibid. 'The provision was intended to secure equality, not identity, of treatment, and would not preclude reasonable differentiations between individuals or groups of individuals.'

<sup>4</sup> E. Schwelb, 'The International Convention on the Elimination of Racial Discrimination', *International and Comparative Law Quarterly* (1966), p. 996, at p. 1019.



for war shall be prohibited by law', and continues by requiring a similar prohibition of 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination'. These are far-reaching provisions, when it is remembered that few legal systems at the present time actually prohibit in express terms propaganda for war and incitement to discrimination;<sup>1</sup> ratification of the Covenant may therefore necessitate legislation or reservations in this respect. The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 covers some of the same ground, but the text of the Covenant is wider in scope because it also includes 'national . . . or religious hatred'.

Finally, Article 24 deals with the rights of the child, which include the right to special measures of protection without discrimination, the requirement of registration immediately after birth, the right to a name and the right to acquire a nationality. (Though the European Convention has no comparable provisions, the European Social Charter of 18 October 1961 does provide very generally in its Article 17 for the right of mothers and children to social and economic protection.) The chief problem arising under Article 24 of the Covenant is to know what are 'such measures of protection as are required by his status as a minor'; if they are interpreted too widely, then the requirement that they shall be accorded 'without any discrimination as to . . . birth . . .' may give rise to difficulties in countries where children born out of wedlock suffer from certain disabilities by comparison with legitimate children.<sup>2</sup>

To conclude this section, we must note three rights which are protected by the European system but not in the United Nations Covenant. The first of these is the right to property, which is protected by Article 1 of the First Protocol to the European Convention. Even though this text was carefully drafted so as to make it acceptable to socialist governments which were engaged on the nationalization of certain forms of private property,<sup>3</sup> and even though the right of property was included (as Article 17) in the Universal Declaration in 1948, no similar provision was found acceptable in the forum of the United Nations.<sup>4</sup> Secondly the Fourth Protocol to the European Convention in its Article 3 contains a prohibition of exile in the terms: 'no one shall be expelled . . . from the territory of the

<sup>1</sup> When this article was adopted by the Third Committee in 1961, none of the Western European States voted in favour, and ten voted against.

<sup>2</sup> The U.N. Sub-Commission also has under examination an important study on 'Discrimination against Persons born out of Wedlock' (Doc. E/CN. 4/Sub. 2/265).

<sup>3</sup> A. H. Robertson, 'The European Convention on Human Rights—Recent Developments', this *Year Book*, 28 (1951), p. 361.

<sup>4</sup> The Commission on Human Rights found it impossible to agree on a text and, at its tenth session in 1954, adjourned consideration of the question *sine die*—Doc. A. 2929, Chapter VI, paragraph 195.

State of which he is a national'. This equally has no counterpart in the United Nations Covenant, perhaps because there are a number of countries where the exile of a political opponent is accepted as a legitimate measure which is more humane than the possible alternatives. The Fourth Protocol to the European Convention also prohibits, in its Article 4, the collective expulsion of aliens; admittedly this is an exceptional measure which would rarely have practical importance, though there may be countries in the world which would have been glad to see such practices prohibited by the United Nations Covenant.

#### IV. THE MACHINERY OF INTERNATIONAL CONTROL

The major problem for European States which are Parties to the European Convention and are thinking of ratifying the United Nations Covenant and its Optional Protocol is that relating to the 'measures of implementation' or system of international control.

The implementation measures of the Covenant are set out in Articles 28 to 45, and also in the Optional Protocol which establishes a procedure for considering individual 'communications'. States ratifying the Covenant will elect from among their respective nationals a Human Rights Committee composed of eighteen individuals acting in their personal capacity, who will be persons of high moral character and recognized competence in the field of Human Rights (Articles 28 to 30). In their election 'consideration shall be given to equitable geographical distribution of membership, and to the representation of the different forms of civilization and of the principal legal systems' (Article 31). The members of the Committee will hold office for four years, but half of the first members for only two years (Article 32).

The States Parties to the Covenant undertake to submit reports on the measures they have taken to give effect to the rights recognized in the Covenant and on the progress made in their enjoyment: they will also 'indicate the factors and difficulties, if any, affecting the implementation of the Covenant'. Copies or extracts from the reports may be sent to the competent Specialized Agencies.

The Committee will study these reports and is authorized to send 'such general comments as it may consider appropriate' to governments, which may then reply by sending their observations on these comments. The Committee may also send its comments to E.C.O.S.O.C. (Article 40). The Committee will make an annual report on its activities, through E.C.O.S.O.C., to the General Assembly (Article 45). Provision for the settlement of allegations of violation by a judicial body is not included in the Covenant.

It thus appears that the essence of the system of implementation of the Covenant is the consideration of reports by governments by an independent committee of international composition. This is a method hallowed by the fact that it has been used successfully by the I.L.O. over a number of years and one may hope that it will in the course of time produce equally useful results in the United Nations framework. For our present purposes of comparison of the United Nations and European systems, it is sufficient to note that there is nothing parallel in the European Convention on Human Rights, though the measures of implementation of the European Social Charter have something of the same character, though they are more elaborate.<sup>1</sup>

There are, however, optional procedures under the United Nations Covenant for considering complaints brought by States and by individuals, and these have a closer affinity to the procedures under the European Convention. They will now be considered successively.

#### A. *Inter-State complaints*

First of all, it is to be noted that in the Covenant (Article 41) the procedure for inter-State complaints is optional, and will apply only to States which have expressly accepted it and if at least ten States have done so. The procedure includes: first, bilateral negotiations between the States concerned; secondly, the good offices of the Human Rights Committee; thirdly, reports by the Committee to the States concerned. There is also provision for the appointment of an *ad hoc* Conciliation Commission, if the matter is not settled to the satisfaction of both Parties and if both Parties agree (Article 42).

The corresponding provision in the European Convention is contained in Article 24 which provides that 'any High Contracting Party may refer to the Commission . . . any alleged breach of the Convention by another High Contracting Party'. Acceptance of this procedure results automatically from ratification of the Covenant.

A comparison between the procedure set out in the United Nations Covenant and that established by the European Convention reveals the following points of similarity and difference. First, the United Nations Covenant requires direct negotiations between the Parties concerned before a case can be referred to the Human Rights Committee; this is not required by the European Convention. Secondly, the rule of exhaustion of domestic remedies applies in both cases. Thirdly, both the United Nations Committee and the Commission are to meet *in camera*. Written and oral proceedings are envisaged in both cases, and the States Parties may be represented when the matter is under consideration. The United Nations Covenant provides that the Committee may call on the Parties 'to supply

<sup>1</sup> A. H. Robertson, *Human Rights in Europe* (1963), pp. 148 and 150.



any relevant information' (Article 41, paragraph (f)), while the European Convention goes further and provides for the possibility of investigations on the spot by a Sub-Commission (Article 28). In both cases the object is to bring about a friendly settlement of the matter. Fourthly, the European Convention does not provide for the possible appointment of an *ad hoc* Conciliation Commission (Article 42 of the United Nations Covenant) though it may be thought that the functions of a Sub-Commission acting under Article 28 (b) of the European Convention are somewhat similar.

The most important difference, however (as already indicated in Section II above), is that there is no provision in the United Nations Covenant for a binding decision on the question whether a violation has occurred. The procedure is aimed essentially at conciliation and friendly settlement; if this fails, the Committee is to confine its report to a brief statement of the facts, to which the submissions of the Parties will be attached (Article 41 (h)). The European procedure, on the other hand, leads to a report by the Commission of Human Rights expressing an opinion whether there has been a violation of the Convention (Article 31) and a final decision by the Committee of Ministers or the Court, which is binding on the Parties.

The coexistence of the two sets of provisions in the two instruments raises the question whether a State which has ratified both instruments and wishes to bring a case against another State which has also done so can choose between the two systems or use them both in turn.

This problem was envisaged when the texts were drafted. Article 44 of the Covenant stipulates that its provisions shall not prevent States Parties from having recourse to other methods of settlement of disputes, which would clearly include those contained in the European Convention. The corresponding provision in the European Convention (Article 62) does not permit, except by special agreement, the submission of a dispute arising out of the interpretation or application of the Convention to a means of settlement other than those contemplated in the Convention.

It therefore follows that European States which are Parties to the European Convention should utilize the European machinery for their disputes on human rights matters rather than refer them to the United Nations, and that this would be quite in conformity with Article 44 of the Covenant. It would also be consistent with the principle set out in Article 33 of the United Nations Charter which approves the regional settlement of disputes in preference to the invocation of United Nations procedures. This general statement that European States should utilize the European machinery in preference to that established by the Covenant should be limited, however, in two respects: first it only applies to disputes about the alleged violation of a right which is included in substantially similar terms in both instruments; secondly, it will only apply to the disputes of the European States



*inter se* and should not prevent them from accepting the United Nations machinery for the settlement of disputes with other States.

### B. *Individual applications*

Different problems again arise when we come to consider applications or 'communications' by individuals alleging violation of their rights.

The right of individual petition (as it is known in the European Convention) is not provided for in the United Nations Covenant itself, but is included in the Optional Protocol to the Covenant on Civil and Political Rights. There were thirty-eight States which abstained when the General Assembly approved this text.<sup>1</sup> Any State which becomes a Party to this Protocol thereby recognizes the competence of the Human Rights Committee 'to receive and consider communications from individuals, subject to its jurisdiction, claiming to be the victims of a violation by that State Party of any of the rights set forth in the Covenant'.

One aspect of the matter which has perhaps received insufficient attention is the following. The Human Rights Committee to which cases may be referred under the Optional Protocol is the Committee provided for in Article 28 of the Covenant on Civil and Political Rights. As we have seen, it will consist of eighteen members elected by the States Parties to the Covenant, taking into consideration 'equitable geographical distribution of membership' and 'the representation of the different forms of civilization and of the principal legal systems'. When discharging its functions under the Optional Protocol, its composition will not be limited to the members elected in respect of the Parties to that Protocol.

When the principle of 'equitable geographical distribution' was applied in the election of the eighteen Vice-Presidents at the Conference on Human Rights in Teheran, it produced the following distribution of seats: Western Group—4; Eastern Europe—2; Africa—5; Asia—4; Latin America—3. If the same distribution is applied in the election of the Human Rights Committee, and if the first thirty-five States to ratify the Covenant are equally divided between the different regions, we shall find that Eastern Europe, Africa and Asia will have the majority of members. Yet many of these are the States which—to judge by their voting in the General Assembly—are unlikely to accept the Optional Protocol. It therefore looks possible—perhaps probable—that the States which accept the Optional Protocol will have the cases which may be brought against them heard by a Committee the majority of whose members are nationals of States which

<sup>1</sup> Algeria, Bulgaria, Burundi, Byelorussia, Cameroon, Chad, Congo (Brazzaville), Congo (Democratic Republic of), Cuba, Czechoslovakia, Dahomey, Ethiopia, Greece, Guinea, Haiti, Hungary, India, Japan, Liberia, Malaysia, Mali, Mauritania, Mongolia, Nepal, Poland, Romania, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Singapore, Spain, Syria, Thailand, Ukraine, Union of Soviet Socialist Republics, United Republic of Tanzania, Yugoslavia.

are not only not Parties to that Protocol but are actually opposed to the very principle which its provisions are designed to secure.

As regards the procedure of the Human Rights Committee when considering individual communications, there is the usual rule about the exhaustion of domestic remedies (Article 2). Moreover, communications will be rejected as inadmissible if they are anonymous, abusive or incompatible with the provisions of the Covenant (Article 3). This Article, however, does not contain the further provision set out in Article 27 of the European Convention permitting the Commission to reject applications as inadmissible on the ground that they are 'manifestly ill-founded'.

The United Nations Committee will consider individual communications in private sessions and 'in the light of all written information made available to it by the individual and by the State Party concerned'. Nothing is said about oral hearings. When it has considered individual communications 'the Committee shall forward its views to the State Party concerned and to the individual' (Article 5, paragraph 3). It will also include in its annual report to the General Assembly 'a summary of its activities under the present Protocol' (Article 6).

Under the terms of the European Convention, as is well known, the Commission draws up a report on the facts and states its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. The report is transmitted to the Committee of Ministers and to the States concerned. Unlike the United Nations Human Rights Committee, the European Commission, in transmitting the report to the Committee of Ministers, 'may make such proposals as it thinks fit' (Article 31). The Committee of Ministers then has to decide whether there has been a violation of the Convention, and the States Parties undertake to regard as binding on them any decision which the Committee of Ministers may take (Article 32); in certain circumstances the case may be referred to the Court of Human Rights; its judgment is then final and binding upon the Parties (Article 53), and its execution is supervised by the Committee of Ministers (Article 54).

The co-existence of the two sets of implementation measures will evidently raise certain problems for those States which have accepted Article 25 of the European Convention and also ratify the United Nations Optional Protocol, particularly the question whether an individual applicant can choose between the two systems or use both of them in turn.

Article 5, paragraph 2, of the Optional Protocol provides that:

The Committee shall not consider any communication from an individual unless it has ascertained that:

- (a) the same matter is not being examined under another procedure of international investigation or settlement;
- ...

Article 27, paragraph 1 (b) of the European Convention states:  
The Commission shall not deal with any petition submitted under Article 25 which:

- ...  
(b) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.

From these texts it would appear that the European Commission would be altogether prevented from considering a complaint previously lodged with the United Nations Committee (unless new evidence has been produced); on the other hand, the Committee could not consider an application already lodged with the European Commission while the European procedure continues, but would be free to do so once the European procedure is terminated.

Since the underlying object of both instruments is to secure the protection of the rights of the individual, it should be accepted that a person who believes that his rights have been violated should have a choice between the European procedure and the United Nations procedure and should be allowed to use that which he considers most favourable to his case. On the other hand, it is more difficult to accept that he should be able to use both procedures in turn. Of course, if he makes a mistake and addresses himself to the wrong forum—for example, by complaining to the European Commission of the violation of a right which is not protected by the European Convention but is included in the United Nations Covenant—then he should be allowed to correct his mistake and make a new application to the right forum. But, in the case of a right which is, in substance, guaranteed by both instruments, it is submitted that there are reasons of public policy which militate against the acceptance of a series of successive international remedies.

If the individual applies first to New York and then to Strasbourg, the European Commission would consider the application inadmissible, as the result of the operation of Article 27 of the European Convention. It is submitted that the same rule should apply vice versa and that an individual applicant should not be allowed (except in the case of an honest mistake) to bring his case first in Strasbourg and then in New York because, even though the issue raised in New York would be, technically speaking, a different issue (because the complaint would be of violation of the terms of a different treaty), this would almost amount to an 'appeal' from the European organs to the United Nations Committee; such an 'appeal' would be bound to undermine, to some extent, the authority of those organs, and it would be quite contrary to the intention of the Parties when they concluded the European Convention and, more particularly, to Articles 32 and 52 thereof, which provide that decisions of the Committee



of Ministers and the Court shall be final. Another line of reasoning which leads to the same conclusion is that when a government accepts a system of international control, it should ordinarily be able to have an expectation of completion of the proceedings within a reasonable time. An individual application will not normally be accepted by the European Commission unless local remedies have been exhausted—which normally means by two or three successive instances over a period of several years. The proceedings before the European Commission and the Committee of Ministers or the Court (if the application is declared admissible) are then likely to take at least another two or three years, to judge by the light of experience. Is it reasonable then to start on another international procedure, which may also be protracted? Moreover, is it reasonable to think that the applicant has a meritorious case if first the national courts and then the European organs have already decided against him? Is it not more in the public interest to put an end to the proceedings after the national remedies and one set of international remedies have been exhausted? We accept the rule of *ne bis in idem* as a proper measure of protection for individuals; should it not also apply at the international level for the benefit of States?

Our conclusion, then, is that an individual applicant who wishes to bring a case against a State which has accepted the two optional procedures under Article 25 of the European Convention and the Protocol to the United Nations Covenant should have the right of choice between the two methods of bringing his case before an international organ but, except in the case of an honest mistake as to the appropriate forum, should accept the consequences of his decision and not have the possibility of going from one forum to the other. This would apply in both directions. The attempt to 'appeal' from the United Nations Committee to the European Commission already seems to be barred by Article 27 (1) (b) of the European Convention. An attempt to 'appeal' from the European organs to the United Nations Committee is at present barred by Article 5 (2) of the Optional Protocol for as long as the European proceedings continue, but not thereafter. What is required therefore is a suitable provision to extend the scope of Article 5 (2) so as to give it the same effect as Article 27 (1) (b). It would appear that this might be done either by a reservation when ratifying the Optional Protocol<sup>1</sup> or by a declaration of interpretation; the method of doing so is a question of legal technique which it is not proposed to examine here. Another possibility might be by the simpler method of

<sup>1</sup> It is true that there is no provision for reservations in the Protocol. However, this does not mean that reservations are not possible, but that the question is governed by the general rules of international law. Articles 19 to 23 of the recently adopted Vienna Convention on the Law of Treaties in effect provide that in cases where a treaty contains no provisions regarding reservations, a State may formulate a reservation if the reservation is not incompatible with the object and purpose of the treaty.



agreement between the European Commission and the United Nations Committee, with a view to harmonizing the two systems. One could easily imagine a system whereby the two organs would agree that cases which could more appropriately be considered by either of them would be automatically transferred to that organ if initially directed to the other, and whereby the principle of *ne bis in idem* would be equally recognized. Such provisions could then be incorporated in the Rules of Procedure of both the United Nations Committee and the European Commission.

Whatever procedure is adopted, it should not be beyond the wit of man—and, more particularly, of lawyers—to work out adequate measures of harmonization of the two systems, the European and the universal, the more so as the fundamental objective of both of them is the same: the better protection of the rights of the common man and of the rule of law throughout the world.

# STATE RESPONSIBILITY FOR THE WRONGFUL ACTS OF REBELS—AN ASPECT OF THE SOUTHERN RHODESIAN PROBLEM\*

By DR. MICHAEL AKEHURST, M.A., LL.B. (Cantab.)

*Lecturer in Law, University of Keele*

## I

THE question whether a State is liable for the wrongful acts of unsuccessful rebels is one which gave rise to a large body of State practice and arbitral decisions during the nineteenth and early twentieth centuries.<sup>1</sup>

At first, the dominant view was that foreign subjects were entitled to no more than equality of treatment with the natives (i.e. they were only entitled to compensation if the government paid it to its own nationals); by living or acquiring business interests in another country, they were deemed to have opted to share in the political fortunes and misfortunes of that country. But soon a qualification was added—the defendant State must not have been negligent in permitting foreign subjects to suffer injuries at the hands of the rebels.<sup>2</sup> Thus qualified, the rule may now be regarded as firmly established, and applies to all rebellions, whether the object of the rebellion is the overthrow of the central government or the secession of a portion of the State's territory to form a new State.<sup>3</sup>

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<sup>1</sup> The question of liability for wrongful acts is by no means the only problem raised by unsuccessful rebellions. There is also the problem whether the State is bound by loans contracted by rebels (Haig Silvanie, *Responsibility of States for Acts of Unsuccessful Insurgent Governments* (1939), Chapter I; whether it is bound by concessions or sales of public property entered into by rebels (ibid., Chapter II); whether it is bound by the rebels' non-political acts of 'governmental routine', e.g. contracts for the purchase of office equipment and legislation on marriage and inheritance (ibid., Chapter III); and whether it may collect taxes and customs duties which have already been collected by the rebels (ibid., Chapter IV). Each of these problems is governed by a different set of rules.

<sup>2</sup> J. B. Moore, *A Digest of International Law* (1906), vol. 6, pp. 954-72; Lord McNair, *International Law Opinions* (1956), vol. 2, pp. 244-73.

<sup>3</sup> E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (1915), pp. 228-39; C. Eagleton, *The Responsibility of States in International Law* (1928), pp. 138-52; H. W. Briggs, *The Law of Nations* (2nd ed., 1953), pp. 713-21; Ian Brownlie, *Principles of Public International Law* (1966), pp. 373-5; Ch. Rousseau, *Droit international public* (1953), pp. 378-81; G. Schwarzenberger, *International Law* (3rd ed., 1957), vol. 1, pp. 627 et seq.

Ch. de Visscher, *Théories et réalités en droit international public* (1953), p. 337, and D. P. O'Connell, *International Law* (1965), vol. 2, pp. 1049-51, suggest that the State should be liable for wrongful acts of unsuccessful rebels if those acts are 'acts of governmental routine' and not revolutionary in purpose; but they confuse delictual acts with contracts and legislation (see above, n. 1). The only case supporting their view, apart from those cases where extended liability was created expressly or by implication in a special treaty provision (Silvanie, *Responsibility of States* . . . , pp. 192-7, 211-19; *Mossé* claim, 20 I.L.R. 1953, 217, 220-1; *Levi* claim, 24 I.L.R. 1957, 303, 311-12; *Treves* claim, ibid., 313, 313-14; *Falco* claim, 29 I.L.R. 21, 31-2; *Fubini*

The question of State responsibility for the wrongful acts of rebels is one which is obviously relevant to the present situation in Southern Rhodesia. In the Southern Rhodesian context the question is still to some extent hypothetical, because so far the main victims of the Smith regime have not been foreign nationals,<sup>1</sup> but the Southern Rhodesian Africans who constitute 94 per cent of the population. Nevertheless, the unusual factual circumstances of the Southern Rhodesian situation may well reveal inadequacies in the traditional rules of State responsibility, so that a re-examination of those rules in the light of the Southern Rhodesian situation would appear to be a useful exercise.

## II

### *Negligence in Failing to Prevent or Suppress a Rebellion*

A State is only liable for the wrongful acts of rebels if it was at fault in failing to prevent those acts. The most extreme form of such failure is negligence in failing to prevent or suppress the rebellion as such.

Normally it is very difficult to prove negligence in failing to prevent or suppress a rebellion. A very heavy onus of proof is placed on the claimant State, since it is assumed to be highly improbable that the *de jure* government of a State will be negligent in resisting its own overthrow.<sup>2</sup>

But the special facts of the Southern Rhodesian situation make it unlikely that the United Kingdom would be able to rely on such a presumption in her favour. The Smith regime is not trying to overthrow the central

claim, *ibid.*, 34, 42-7) is the *Mariposa* claim (*U.K. v. Mexico*) 1931, R.I.A.A. v, 272, 274. Dissimilarity between delictual acts, on the one hand, and contracts and legislation, on the other, may be shown by making a comparison with the law on State succession; the successor State is bound by rights acquired by foreigners under contracts and legislation (D. P. O'Connell, *State Succession in Municipal Law and International Law* (1957), vol. 1, Chapters 10-18), but does not succeed to the predecessor State's liability for unliquidated international claims (*ibid.*, Chapter 19).

At one time the United States of America argued that States were liable for acts of rebels unless the rebels had been recognized as belligerents; Moore's *Digest*, vol. 6, pp. 972-91. But this was a passing phase. United States practice since 1900 has followed the orthodox rule; G. H. Hackworth, *Digest of International Law* (1943), vol. 5, pp. 666-83. Arbitrations in which the U.S.A. was involved always upheld the orthodox rule, J. B. Moore, *International Arbitrations* (1898), pp. 2859-992, with only a few exceptions. When a foreign State recognizes rebels as belligerents, it is admitting that the rebels are beyond the control of the respondent State and that the respondent State, by fighting, is doing its best to re-establish control; and such admissions will go a long way towards estopping the foreign State from claiming that the respondent State has failed to exercise due diligence in preventing injuries by the rebels to the foreign State's nationals. But normally the respondent State will be able to prove due diligence without needing to rely on an estoppel.

<sup>1</sup> But see the cases of detention, restriction and deportation of foreign nationals mentioned in *British Practice in International Law* (1966), p. 106; and for the problem of the Southern Rhodesian loans, see below, pp. 66-70.

<sup>2</sup> The Mexican Claims Commissions of the 1920s ran contrary to the general trend and relaxed the burden of proof; Silvanie, *Responsibility of States for Acts of Unsuccessful Insurgent Governments*, pp. 187-92 (although it should be noted that by no means all the cases cited by Silvanie were concerned with negligence in preventing or suppressing a rebellion).



government of the United Kingdom; it is simply trying to secede. Admittedly it can be presumed that States will normally resist secessionary movements almost as fiercely as they resist attempts to overthrow the central government, but it is doubtful whether this presumption applies to Southern Rhodesia. Southern Rhodesia is geographically far from the United Kingdom, and was already close to full independence before its unilateral declaration of independence. Everyone expected Southern Rhodesia to become independent soon; the only uncertainties related to the date and to the constitutional changes which would have had to be made first. The real dispute has never been between Southern Rhodesia and the United Kingdom, but between the two races in Southern Rhodesia itself; and many Africans fear, with some justification, that the sympathies of the United Kingdom are directed primarily towards its own kith and kin in Southern Rhodesia.

Not surprisingly, no arbitral tribunal has ever found a State guilty of negligence in failing to prevent a rebellion. But there have been cases where such a charge was made, and where the arbitrator only found the defendant State not liable because the rebellion had not been reasonably foreseeable; there is a clear inference that the defendant State would have been liable if it had failed to take steps to prevent a rebellion that *was* reasonably foreseeable.<sup>1</sup>

No doubt some people would argue that the United Kingdom was to blame for the unilateral declaration of independence because it allowed a situation to develop where the white population of Southern Rhodesia had not only strong motives for making a unilateral declaration of independence (maintenance of a privileged and dominant position over the negroes), but also the means to carry it out (internal self-government with considerable legal and physical power). But such an argument goes too far; it would have made the United States of America liable for the acts of the Confederacy,<sup>2</sup> whereas in fact there are many decisions holding the United States not liable for those acts.<sup>3</sup> It is submitted that no action or inaction by the United Kingdom could be invoked as proof of negligence in preventing the unilateral declaration of independence, unless there was, at the time of that action or inaction, a reasonable possibility that a unilateral declaration of independence would occur.<sup>4</sup> As late as September

<sup>1</sup> *Ziat and Ben Kiran* claim (*U.K. v. Spain*) 1924, R.I.A.A. ii, 729, 730; *Home Missionary Society* claim (*U.S.A. v. U.K.*) 1920, R.I.A.A. iv, 42, 44.

<sup>2</sup> There is a strong similarity between Southern Rhodesia and the Southern States. The federal system gave the Southern States a powerful political organization, which facilitated secession, just as the 1961 Constitution made Southern Rhodesia almost independent in internal affairs; and the motives for secession were the same in both cases—preservation of racial privilege (the only difference being that in the Southern States the white population was larger and the racial privilege far more odious in character).

<sup>3</sup> See, e.g., the cases cited below, p. 62, n. 3.

<sup>4</sup> See the *Ziat and Ben Kiran* and *Home Missionary Society* claims, above, n. 1. on this page.

1963 no such reasonable possibility existed. This is shown by the Security Council debates, which took place during that month, concerning the British decision to 'revert' armed forces to Southern Rhodesian control upon the dissolution of the Federation of Rhodesia and Nyasaland. The British decision was criticized on the grounds that it would enable the Europeans in Southern Rhodesia to oppress the negroes, but there was no suggestion that it would facilitate a unilateral declaration of independence; nothing was said about a unilateral declaration of independence.<sup>1</sup>

Threats of unilateral declaration of independence began to be made by European politicians in Southern Rhodesia early in 1964,<sup>2</sup> and increased after Mr. Smith became Prime Minister of Southern Rhodesia in April 1964 and the Labour party won the British general election in October 1964. On 6 May 1965 the Security Council passed a resolution urging the United Kingdom not to accept a unilateral declaration of independence.<sup>3</sup> On 11 November 1965 the unilateral declaration of independence occurred.

During 1964 and 1965 the British Government issued many public warnings to the Smith regime that severe economic sanctions would be imposed on Southern Rhodesia in the event of a unilateral declaration of independence. The Official Secrets Acts make it impossible to know what other steps were taken to prevent a unilateral declaration of independence. Actually, the powers of the Smith Government were so great under the 1961 Constitution that there was little that the British Government could have done, except issue warnings. Any attempt by the British Government to dismiss the Smith Government, to revoke the 1961 Constitution, to legislate for Southern Rhodesia without her consent or to instruct the Governor to ignore the advice of his Ministers,<sup>4</sup> would probably only have provoked an even earlier declaration of independence. If the British Government had moved troops to Zambia as a precautionary measure, the reactions of the Smith regime might have included not only an earlier declaration of independence, but also a pre-emptive strike by the Southern Rhodesian air force against the bases in Zambia before the British military build-up had become operational.

<sup>1</sup> *S.C.O.R.*, 1064th-1069th meetings, 9-13 September 1963. It is true that many speakers referred to an earlier O.A.U. resolution which contemplated certain action in the event of the Southern Rhodesian settlers 'usurping authority', but this phrase is ambiguous. Since the O.A.U. believed that authority in Southern Rhodesia rightfully belonged to the Southern Rhodesian Africans and not to the British Government, 'usurping authority' would cover not only a unilateral declaration of independence, but also the grant of independence by the United Kingdom to a 'settler' government.

<sup>2</sup> Keesing's *Contemporary Archives* (1963-4), pp. 19997, 20008, 20273.

<sup>3</sup> S/6329/Rev. 1.

<sup>4</sup> Advice which he was normally obliged to accept under the 1961 Constitution. On 5 November 1965 the Governor, on the advice of his ministers, proclaimed a state of emergency, which, as it turned out, facilitated the unilateral declaration of independence, by enabling the Smith regime to stifle criticism. See R. S. Welsh, 'The Constitutional Case in Southern Rhodesia', *Law Quarterly Review*, 83 (1967), pp. 64, 66.

In any case, negligence or diligence in preventing a rebellion is only half the story; there remains the necessity of diligence in suppressing a rebellion once it has started. Many African States consider that the British policy of relying on non-military sanctions against the Smith regime is doomed to failure, and that force is the only way to bring the rebellion to an end; some of them even broke off diplomatic relations with the United Kingdom because they considered that the United Kingdom was half-hearted in reacting to the unilateral declaration of independence.<sup>1</sup>

There are in fact some cases which indicate that due diligence in suppressing a rebellion necessarily implies the use of force. In the *Santa Clara Estates Co.* claim brought by the United Kingdom against Venezuela, the United Kingdom argued that a limit must be set to the time within which the Government must either reduce the revolutionaries to subjection, or declare the independence of the revolted territory (and thereby allow foreign governments to take the protection of their nationals into their own hands), or accept liability for its negligent failure to suppress the rebellion. The United Kingdom further argued that Venezuela had not put down the rebellion within a reasonable time; that a whole year was beyond that proper limit of time during which Venezuela was justified in tolerating an independent government of the insurgents, for one determined battle would have been enough to dispose of the whole trouble; and that Venezuela, having neither overpowered the rebels within a reasonable time nor recognized their independence, must accept liability for their acts. The umpire rejected the British claim on the facts. He said that no arbitrary time-limit of a year or any other period could be set, pointing out that the war of American independence had lasted seven years and the American civil war four; and he found that the delay in repressing the rebels was due to the strength of the rebels, not to the passivity of the Government.<sup>2</sup> There is a clear inference that failure by Venezuela to take any military action at all against the rebels would have been interpreted as negligence in suppressing the rebellion.

Venezuela seems to have lost another case brought against her—the *Venezuelan Steam Transportation Co.* claim<sup>3</sup>—for this very reason. The commission gave no reasons for its decision, but umpires in later cases considered that the following statements in the brief filed by the agent of the claimant State (the United States) may have represented the *ratio decidendi*: 'the government allowed the town of Bolívar to remain for

<sup>1</sup> Keesing's *Contemporary Archives* (1965-6), pp. 21130, 21175, 21181, 21464, 21738.

<sup>2</sup> 1903, R.I.A.A. ix, 455, 456-8. The umpire also held that Venezuela's attempt to collect taxes already paid to rebels made her liable to refund the second payment, but did not make her liable, by a sort of estoppel, for the rebels' acts, as the United Kingdom had claimed (p. 458).

<sup>3</sup> Moore's *International Arbitrations*, p. 1693. The case was decided in 1895, but the facts took place in the early 1870s.



nearly six months in the hands of the "Blues" [rebels], and permitted them to move quietly away when the government forces approached';<sup>1</sup> the Government had shown a 'lack of diligence in permitting the "Blues" to remain for so long at Ciudad Bolívar and in control of the vessels in question, when they could have been so easily dislodged, as was proven when the effort was in fact made';<sup>2</sup> and 'a fort near the mouth of the Orinoco was held against the Venezuelan government as late as January 1872 by a "Blue" officer and his wife with two old-fashioned smoothbore guns, equally dangerous at both ends'.<sup>3</sup>

On the other hand, a State cannot be expected to take unreasonable military risks in suppressing a rebellion. Previous cases have all concerned dissident portions of a State's metropolitan territory, or coastal colonies under the sovereignty of a maritime power. Military action in Southern Rhodesia presents unprecedented problems; it is a land-locked territory, thousands of miles from any other British territory or military base. Military intervention by the United Kingdom would necessitate the prior establishment of forward bases in Zambia or some other neighbouring area, which might well provoke a pre-emptive strike by the Smith regime before the British military build-up had become operational. It is well established that an international tribunal will respect the discretion of a defendant State's military commanders if they decide to attack the rebels in one place rather than another.<sup>4</sup> Is this not a principle which should be extended? If a defendant State *genuinely* believes that it can end a rebellion more effectively by non-military than by military means, should not its discretion be respected by others?<sup>5</sup>

<sup>1</sup> Quoted in the *Wenzel* case, 1903, R.I.A.A. x, 428, 431.

<sup>2</sup> Quoted in the *Aroa Mines* case, 1903, R.I.A.A. ix, 402, 440-1.

<sup>3</sup> Quoted in the *Wenzel* case, above. See also *Baldwin's Tehuantepec claim* (*U.S.A. v. Mexico*) 1839, Moore's *International Arbitrations*, p. 2859. Baldwin was prosecuted by insurgents for evading customs duties and suffered a denial of justice. The U.S. Commissioner held Mexico liable because (i) the prosecution by the insurgents was a continuation of proceedings begun by the *de jure* authorities and was continued after restoration of *de jure* control; (ii) Mexico made no effort to suppress the rebellion, but after a time pardoned the rebels (but without prejudice to the rights of third parties), commended them for the action they had taken against Baldwin, confirmed them in posts which they had seized during the rebellion, and gave them other public appointments, which they used to thwart Baldwin's efforts to obtain redress in the local courts. The umpire decided for the United States of America without giving reasons.

<sup>4</sup> *Revesno* case (*Italy v. Venezuela*), 1903, R.I.A.A. x, 582, 583.

<sup>5</sup> This presupposes that the State's discretion has not been limited by action taken by the Security Council under Chapter VII of the Charter. It is true that the Security Council cannot oblige a State to use force unless the State has agreed to do so, but the Security Council could decide that the rebellion constituted a threat to international peace and send a United Nations force to suppress it, even against the wishes of the State concerned; in these circumstances the State's discretion is in effect taken away by the Security Council.

The defendant State's discretion must in any case be exercised in good faith. The defendant State would not escape liability if the dominant motive for its refusal to use force could be shown to be something other than a genuine belief in the possibility of ending the rebellion more effectively by non-military means—e.g. secret sympathy for the rebels, or a reluctance to alienate sectors of its own public opinion which were sympathetic towards the rebels.

There is a further factor to be considered. All the cases cited above were decided before 1914, i.e. at a time when international law looked with equanimity on the use of force in international relations. Since then international law has sought to banish the horrors of war by restricting the right of States to indulge in international wars. Is it consistent to hold that a State is still under a *duty* to unleash the even greater horrors of civil war when it is threatened by a rebellion?<sup>1</sup> Moreover, military operations endanger the lives and property of all the inhabitants of the rebellious area, including the nationals of foreign States, who have absolutely no right to compensation for losses as a result of military operations, unless there is a breach of the laws of war.<sup>2</sup> Foreign States, if they are wise, ought not to insist on military suppression of a rebellion, if their nationals are more likely to be injured by military operations than by a continuation of the rebellion.

If a State fails to take reasonable steps to suppress a secessionary rebellion, and fails to reach a negotiated settlement with the rebels, then it is only a question of time (and recognition) before the rebels are regarded as having formed a new State.<sup>3</sup> The new State then becomes retroactively liable for the wrongful acts of those striving to set it up;<sup>4</sup> and the mother-State is retroactively quit of all liability, if only in order to prevent injured foreigners receiving double compensation. But, in the case of Southern Rhodesia, such an outcome is more or less precluded by the action taken by the United Nations against the Smith regime. Resolutions 216 and 217 of the Security Council, of 12 and 20 November 1965 respectively, which call upon States not to recognize the illegal regime in Southern Rhodesia, are not mandatory, but, now that the Security Council has imposed mandatory economic sanctions on the regime, recognition would be a clear violation of the spirit of Article 2 (5) of the Charter, which provides that 'All members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.'<sup>5</sup> To give recognition to an unrecognized

<sup>1</sup> Consider the desire expressed by public opinion throughout the world for a negotiated settlement of the Biafran rebellion.

<sup>2</sup> Borchard, *The Diplomatic Protection of Citizens Abroad*, pp. 233-4, 246-80; Eagleton, *The Responsibility of States . . .*, pp. 153-5.

<sup>3</sup> Clearly these conclusions only apply to secessionary rebellions. If a rebellion is aimed at overthrowing the central government, failure by the government to resist will lead sooner or later to its fall, whereupon the acts of the successful rebels are attributed to the State as from the start of the rebellion: 'the nation is responsible for the obligations of a successful revolution from the beginning, because, in theory, it represented *ab initio* a changing national will, crystallizing in the finally successful revolt'; *Bolívar Railway Co. claim (U.K. v. Venezuela)*, 1903, R.I.A.A. ix, 445, 453.

<sup>4</sup> By analogy from the *Bolívar Railway Co. claim* (see previous note).

<sup>5</sup> Since Southern Rhodesia is not regarded as a State by the United Nations, one can only speak of the spirit, not the letter, of Article 2 (5).

regime which the United Nations is trying to bring down must surely be regarded as 'assistance' to that regime.<sup>1</sup>

### III

#### *The Effect of Amnesty*

Since the United Kingdom has ruled out the use of force in Southern Rhodesia, the rebellion there can only be brought to an end by a negotiated settlement; and such a settlement is almost certain to contain an amnesty for the rebels. It is therefore opportune to examine what international law has to say about the effect of amnesties on a State's responsibility for the wrongful acts of rebels.

The law on this subject is confused, chiefly because of a failure to distinguish between amnesties which extinguish rebels' civil liability and amnesties which extinguish their criminal liability.

An amnesty which extinguishes the rebels' civil liability makes the State granting the amnesty liable for the damage caused by the rebels. As the Guerrero report put it, 'the State would become directly responsible for such damage if, by a general or individual amnesty, it deprived foreigners of the possibility of obtaining compensation'.<sup>2</sup>

It is perhaps better to regard the State as liable, not for the rebels' acts as such, but for expropriating the right of action which the alien had against the rebels. Such expropriation is in the public interest; no tribunal will question a State's discretion if the State genuinely believes that an amnesty is necessary to bring about a reconciliation between contending factions. But, if an individual is required to make a special sacrifice in the public interest, it is just that the cost of his sacrifice should be shared by the whole community; and that is what compensation is intended to achieve. Compensation for the lost right of action should be equal to the amount which the alien would probably have recovered if the amnesty had not occurred; and this amount is likely to be small, since the only alternatives to an amnesty are either (i) continuation of the rebels in *de facto* local control (which will probably mean that no action can be brought against them), or (ii) a bloody war of repression, in the course of which the rebels may well lose all their possessions, so that they will not be worth suing afterwards.

The cases conflict about the effects of an amnesty which merely extinguishes criminal and not civil liability. In the *Divine* case the umpire

<sup>1</sup> For an alternative argument obliging States not to recognize regimes like the Smith regime, see H. Lauterpacht, *Recognition in International Law* (1947), p. 172.

<sup>2</sup> Conclusion 9 (in part); League of Nations publication, *V. Legal*, 1927. V. 1 (doc. C. 196. M. 70. 1927. V), p. 105. See also the *Cotesworth and Powell* claim (*U.K. v. Colombia*), 1865, Moore's *International Arbitrations*, pp. 2050, 2079, 2085, although it appears that the officials who injured the claimants in that case were not in fact rebels.



said: 'It is urged that the Mexican Government granted an amnesty to Carvajal and, therefore, made itself responsible for his acts. Other governments, including that of the United States [in 1865], have pardoned rebels, but they have not on this account engaged to reimburse to private individuals the losses caused by those rebels.'<sup>1</sup> But all the other cases regard amnesties as making the State liable, usually on the grounds that, 'by pardoning a criminal, a nation assumes the responsibility for his past acts.'<sup>2</sup>

This rationale is totally unconvincing. After all, in municipal law an amnesty is never treated as an assumption of responsibility for crimes, or as a tacit ratification of them.

Not surprisingly, the cases seek to bolster up the rationale by subsidiary arguments. Thus, it is said that an amnesty deprives an alien of a right to sue the rebels.<sup>3</sup> So it does, if the amnesty extends to civil liability, as in the *Cotesworth and Powell* case. But, if it only covers criminal liability, it does not deprive an alien of his right to bring a civil action. It is not even true to say that a fugitive criminal must be arrested before he can be sued in tort, since most legal systems permit judgment by default. Indeed, if a rebel were prosecuted, he might lose all his assets in legal costs, fines and confiscations, so that he would not be worth suing afterwards.

Another argument was put forward in the *West* claim (a case which was in fact concerned with bandits, not rebels): 'amnesty for a crime has the same effect, under international law, as not punishing a crime, not executing the penalty, or pardoning the offence.'<sup>4</sup> The problem of amnesty thus merges into the more general problem of a State's duty to punish crimes against aliens, a problem which came to a head in *Janes's* claim.<sup>5</sup> From the vast amount of literature which that case provoked,<sup>6</sup> it is possible to detect several reasons, of varying degrees of soundness, for making a State pay compensation for crimes against aliens which it has failed to punish:

(i) Failure to punish a crime deprives the alien of a chance to sue; this has already been discussed and rejected.

<sup>1</sup> *U.S.A. v. Mexico* (1875?), Moore's *International Arbitrations*, pp. 2980, 2981. One can reach the same result by placing an *a contrario* interpretation on the Guerrero report (see above, p. 56, n. 2).

<sup>2</sup> *Cotesworth and Powell* claim (loc. cit. above, p. 56, n. 2), at p. 2085. This was also one of the grounds of decision in the *Montijo* case (*U.S.A. v. Colombia*), 1875, Moore's *International Arbitrations*, pp. 1421, 1438-9. In the *Bovalins and Hudland* claim an amnesty was treated as tacit approval or ratification of rebels' acts (*Sweden-Norway v. Venezuela*), 1903, R.I.A.A. x, 768. The only reason why an amnesty was not regarded as making Venezuela liable in the *Wenzel* case was the fact that the amnesty was void under municipal law (*Germany v. Venezuela*), 1903, R.I.A.A. x, 428.

<sup>3</sup> *Cotesworth and Powell* and *Montijo* cases, cited in the previous note.

<sup>4</sup> *U.S.A. v. Mexico* (1927), R.I.A.A. iv, 270, 271.

<sup>5</sup> *U.S.A. v. Mexico* (1926), R.I.A.A. iv, 82.

<sup>6</sup> H. W. Briggs, *The Law of Nations* (2nd ed., 1953), pp. 743-6.

(ii) A murdered alien's relatives have their feelings injured by the State's failure to punish the murderer.<sup>1</sup> This theory, which actually constitutes the *ratio* of *Janes's* case, assumes a vindictive spirit on the part of the relatives, places an inflated financial value on their feelings<sup>2</sup> and breaks down if the murdered alien had no close relatives of sound mind (or was on bad terms with them). It is probably subconsciously influenced by the retributive theory of punishment; but modern penology has abandoned the retributive theory and prefers to view punishment as a means of preventing crimes by reforming the offender and/or by deterring him and others in future.

(iii) The best explanation is that the frankly punitive damages awarded in cases like *Janes's* claim are designed to force the State into improving its administration of justice, so that its subjects will be deterred from committing crimes against aliens in the future.

This concept of deterrence is sound enough in the case of 'ordinary' crimes; but, when crimes are committed as part of a rebellion, the best way of making sure that they do not recur is not to punish the criminals, but to bring the rebellion to a speedy end and to ensure that it does not break out again. Now, as regards bringing a rebellion to an end, the State must be allowed, at its discretion, to choose between military repression and a negotiated settlement (which will almost certainly include some sort of amnesty); and other States ought not to question its discretion if it chooses a negotiated settlement, particularly since this removes the danger of their own subjects suffering losses as a result of fighting.<sup>3</sup> As regards prevention of fresh rebellions, it must be emphasized that rebels, unlike ordinary criminals, have genuine grievances, and the respondent State must be allowed a discretion in choosing between severity and magnanimity as a means of preventing further rebellions; and magnanimity will almost certainly entail an amnesty. Leniency may encourage fresh rebellions, but the bitterness of the vanquished who are deprived of an amnesty may also kindle another revolt.<sup>4</sup>

To sum up, an amnesty which extinguishes civil liability makes the State liable because it is a form of expropriation; but an amnesty which

<sup>1</sup> In the case of crimes not resulting in death, presumably the feelings of the injured alien himself would be taken into account.

<sup>2</sup> English law scarcely ever awards damages for injured feelings. Continental systems are more generous in this respect, but the actual sums awarded in cases like *Janes* go far beyond what a continental litigant could hope to recover. The suspicious thing is that the damages for injured feelings in *Janes's* claim were exactly equal to the value of *Janes* to his family as a bread-winner.

<sup>3</sup> See above, p. 55.

<sup>4</sup> It sometimes happens, as in Southern Rhodesia, that the population of rebel-held territory is divided into two or more groups, only one of which is rebellious. Obviously the arguments set out above about using magnanimity as a means of preventing further rebellions would not apply if magnanimity took the form of making concessions to the rebellious group at the expense of the other groups—for this might provoke the other groups to rebel in their turn.

merely extinguishes criminal liability does not make the State liable. However, there are three exceptions to the latter principle.

First, an amnesty extinguishing criminal liability will make the State liable if it is not a *bona fide* exercise of the State's discretion—for instance, if it is intended not to achieve a statesmanlike end to the rebellion, but to spite foreigners by pardoning crimes against them while maintaining criminal liability for similar crimes against the State's own nationals. Although there is no authority for this proposition, its justice is self-evident.

Secondly, it has often happened, especially in Latin America, that lawless men have profited from the existence of a civil war to commit acts of brigandage under the pretext that they were carrying out acts of war on behalf of one side or another. Consequently, Hyde suggests that an amnesty may only legitimately cover 'acts incidental to revolution and directed against the grantor' and also 'internationally illegal acts incidental to the conflict and committed for a public rather than a private end and against whomsoever directed', but not 'essentially lawless conduct on the part of unsuccessful insurgents or bandits or other disaffected persons, such as acts not to be regarded as normal incidents of the public endeavour of the insurgents to attain their ends by force'.<sup>1</sup> An amnesty must be limited to those acts which need to be pardoned in order to secure a political settlement; as regards other acts, security and justice for foreigners must override leniency for rebels.

Thirdly, the State may expressly assume liability for the rebels in the amnesty. Thus, in the *Montijo* case, Colombia concluded a 'peace treaty' with the rebels which provided, *inter alia*, that 'the Government assumes as its own the expense of the steamers and other vehicles which the revolution has had to make use of up to that date'.<sup>2</sup>

Amnesties are sometimes accompanied by the appointment of rebel leaders to official positions. The effects of such appointments vary according

<sup>1</sup> C. C. Hyde, *International Law* (2nd ed., 1947), vol. 2, pp. 983-4. Borchard, *The Diplomatic Protection of Citizens Abroad*, pp. 238-9, makes a slightly different distinction: an amnesty only renders the State liable if it had previously treated the rebels as criminals, not as belligerents. But this seems to be simply a variant on the now exploded idea that the State is liable for the acts of rebels unless they are recognized as belligerents (see above, p. 49, n. 3). The *de Brissot* case (1885), relied on by Borchard, had nothing to do with amnesties; it concerned the negligent failure of Venezuela to catch rebels who had attacked a U.S. steamer. In any case, only one of the three Commissioners lent support to Borchard's view; Moore's *International Arbitrations*, pp. 2949, 2967.

<sup>2</sup> *U.S.A. v. Colombia* (1875), *ibid.*, pp. 1421, 1438-9. (For the alternative ground for the decision, see above, p. 57, n. 2). Of course, if a government comes into possession of property which had been wrongfully taken from aliens by rebels, it must always restore or pay for it, in order to prevent an unjust enrichment, whether or not there is an agreement to that effect; *Mazzei* case (*Italy v. Venezuela*), 1903, R.I.A.A. x, 525. The agreement in the *Montijo* case went further, making the government liable for the running expenses of the steamers incurred *while they had been in rebel hands* (see p. 1443 of the report).



to whether the rebels are appointed to new positions or confirmed in positions which they had seized during the rebellion.

The effects of appointing rebel leaders to new positions vary in turn according to the level of the positions. Since a State is liable for the acts of successful revolutionaries,<sup>1</sup> it is only logical that it should be liable if the rebels and the *de jure* government get together to form a coalition government. Thus, in the *McCord* case (1888), Peru argued that the people who had injured McCord were rebels for whom it was not responsible; when the United States of America argued that Peru was liable because the rebels had later joined a coalition government, Peru abandoned its plea that it was not liable for the rebels, and sought to defend the claim on entirely different grounds.<sup>2</sup> But public appointments which do not amount to the formation of a coalition government do not make the State liable.<sup>3</sup> It is true that in the *Baldwin* and *Bovalins and Hudland* cases States were held liable after appointing rebels to official positions, but the *Baldwin* case can be distinguished because the rebels used their new positions to prevent Baldwin obtaining redress in the courts,<sup>4</sup> and in the *Bovalins and Hudland* case the public appointments accompanied an amnesty, which was regarded as the crucial factor in creating liability.<sup>5</sup> Similarly, in the *Wenzel* case, where the amnesty was disregarded because it was void under municipal law, public appointments on their own were not regarded as enough to fix the State with liability.<sup>6</sup>

Retroactive confirmation of rebels in official positions which they seized during the rebellion, on the other hand, probably does make the State liable.<sup>7</sup>

<sup>1</sup> *Bolivar Railway Co.* claim, above, p. 55, n. 3.

<sup>2</sup> Moore's *Digest*, vol. 6, pp. 985-90.

<sup>3</sup> *Divine* case (*U.S.A. v. Mexico*), 1875 (?), Moore's *International Arbitrations*, p. 2980. Where does one draw the line between the formation of a coalition government and other appointments? In the *Guastini* case the Italian Commissioner argued that Venezuela was liable because, under the settlement with the rebels, 'the revolutionary party . . . now has members in the Cabinet, in Congress, among the high officials of the customs, and even among the presidents of the States . . . To others [i.e. other members of the revolutionary party] were given positions and emoluments, so that the revolution, today in subjection, might tomorrow become the controlling power of the government' (*Italy v. Venezuela*), 1903, R.I.A.A. x, 561, 567. But the umpire and the Venezuelan Commissioner decided for Venezuela without mentioning these public appointments, which may indicate that even appointment to very high office does not render the State liable unless there is a coalition government in law as well as in fact.

<sup>4</sup> See above, p. 54, n. 3. In the *Guastini* case (see previous note), the Italian Commissioner estimated that the rebels' new positions gave them '*de facto* impunity' (p. 568), but the umpire and the Venezuelan Commissioner decided the case for Venezuela without mentioning the rebels' new positions—presumably they considered the Italian Commissioner's estimate of the facts unfounded.

<sup>5</sup> See above, p. 57, n. 2.  
<sup>6</sup> *Germany v. Venezuela* (1903), R.I.A.A. x, 428. The umpire made it clear that a valid amnesty would have made Venezuela liable. See above, p. 57, n. 2.

But in the *Bovalins and Hudland* case a tacit amnesty was inferred from public appointments! The Italian Commissioner made a similar inference in the *Guastini* case, but his arguments were brushed aside in silence by the umpire and the Venezuelan Commissioner.

<sup>7</sup> The *Baldwin* case is the only case in which such retroactive confirmation occurred, although it may not have been the crucial factor making the State liable. See above, p. 54, n. 3.

Such an appointment must be taken as an implied ratification of the rebels' acts and an implied admission of liability.

#### IV

##### *Ratification of the Acts of Rebels*

If a State becomes liable for the acts of rebels, by means of an *implied* ratification, when it retroactively confirms rebel leaders in official positions which they seized during the rebellion, it must *a fortiori* become liable for the acts of rebels when it *expressly* ratifies and approves those acts.<sup>1</sup> Nor is this surprising, since a State becomes liable for the acts of individuals,<sup>2</sup> and the *ultra vires* acts of officials,<sup>3</sup> if it expressly approves and adopts them. In the case of a rebellion, ratification of the acts of rebels, if it occurs at all, normally takes place after the end of the rebellion; and it may be considered unlikely that a State will ratify the acts of rebels while the rebellion is still continuing. Nevertheless, it is arguable that such a ratification did take place in Southern Rhodesia, and, what is more, took place in advance of the acts concerned.

Immediately after the unilateral declaration of independence, Mr. Smith and his ministers were dismissed by the Governor,<sup>4</sup> and the legislature was forbidden to legislate,<sup>5</sup> but the Governor and the United Kingdom Government went out of their way to emphasize that no similar steps were being taken against other persons holding official positions in Southern Rhodesia. However, with the exception of the Governor (and to some extent the judges),<sup>6</sup> all holders of official positions in Southern Rhodesia accepted the authority of the rebels. Would the United Kingdom, by failing to dismiss holders of official positions who had sided with the rebels, remain liable for any of their wrongful acts?

Arbitral awards tend to use a number of arguments interchangeably in order to justify the defendant State's qualified non-responsibility for the

<sup>1</sup> See the *Baldwin* case above, p. 54, n. 3.

<sup>2</sup> Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 217.

<sup>3</sup> *Ibid.*, p. 191. Similarly, if an official acts *ultra vires* in making a contract in the name of the State, the State will nevertheless be liable under that contract if it acts on the contract; T. Meron, 'The Repudiation of *Ultra Vires* State Contracts and the International Responsibility of States', *International and Comparative Law Quarterly*, 6 (1957), pp. 273, 282-6.

<sup>4</sup> *British Practice in International Law* (1965), p. 93.

<sup>5</sup> Southern Rhodesia Constitution Order, 1965 (S.I. No. 1952 of 1965), s. 3 (1) (a).

<sup>6</sup> On the ambiguous attitude of the Southern Rhodesian judges, who applied neither the 'Smith Constitution' of 1965 nor the [British] Southern Rhodesia Constitution Order, 1965, see Claire Palley, 'The Judicial Process: U.D.I. and the Southern Rhodesia Judiciary', *Modern Law Review*, 30 (1967), p. 263. After the Privy Council's decision in *Madzimbamuto v. Lardner-Burke* (see below, p. 65) had made it impossible for the judges to maintain their attitude of neutrality, the Appellate Division of the Rhodesian High Court accepted Mr. Smith's 1965 Constitution as fully valid; but one of the judges resigned in protest: *International and Comparative Law Quarterly*, 17 (1968), pp. 1031-2, 1050-1. See also R. W. M. Dias, 'Legal Politics: Norms behind the Grundnorm', (1968) *Cambridge Law Journal*, 233.

wrongful acts of rebels ('qualified', because the State *is* responsible if it can be shown to have been negligent in failing to prevent or suppress the rebellion). For instance, in the *Henriquez* case it was held that Venezuela was not liable for the acts of the rebel General Rivera, since 'it is not claimed . . . that General Rivera held any *office de facto* or *de jure* under the authority or by the consent of the Republic of Venezuela. Indeed . . . such government as there was under him was in direct opposition to the constitutional government, and was seeking the life of that government'. But two pages later the Claims Commission said, 'the government of Venezuela is responsible to aliens . . . for the injuries they receive in its territory from insurgents . . . whom the government could *control*, and not otherwise'.<sup>1</sup>

There are thus two separate justifications for the State's qualified non-responsibility: first, the rebels held no official position; and second, they were beyond the government's control. What has scarcely ever been realized is that these two tests do not necessarily lead to the same result, because it is possible for a rebel to hold an official position and yet still be beyond the government's control. This is exactly what has happened in Southern Rhodesia. If the true rationale of non-responsibility is lack of control, the United Kingdom would not be liable for *any* acts by holders of official positions in Southern Rhodesia, since they are clearly beyond the control of the United Kingdom. But, if the true rationale of non-responsibility is the rebel's lack of official status, then the United Kingdom would be liable for all acts by remaining<sup>2</sup> holders of official positions in Southern Rhodesia which were within the apparent scope of their powers under the 1961 Constitution, but not for acts which were aimed at furthering the rebellion or which were in any other way outside the apparent scope of their powers under the 1961 Constitution (because no State is liable for the acts of its officials when those acts bear no conceivable relation to the officials' functions and powers). For instance, the United Kingdom would be liable if the Southern Rhodesian police held an alien without trial on a charge of burglary, but not if they held him without trial on a charge of demonstrating against the unilateral declaration of independence.

Previous cases are of little help, because they used the 'control test' and the 'status test' interchangeably, without apparently perceiving that the two tests could lead to different results; the explanation is probably that the two tests did lead to the same results *on the facts of the cases*.<sup>3</sup>

<sup>1</sup> *U.K. v. Venezuela* (1903), R.I.A.A. x, 713, 714, 716 (italics added).

<sup>2</sup> The word 'remaining' is used in order to exclude the ministers and the legislature; see above, p. 61, nn. 4 & 5.

<sup>3</sup> *Prats* case (*Mexico v. U.S.A.*), 1868, Moore's *International Arbitrations*, pp. 2886, 2889-90, 2892-3, 2895; *Hanna* case (*U.K. v. U.S.A.*), 1871, *ibid.*, pp. 2982, 2983, 2985, 2986-7; *Henriquez* case (n. 1 on this page). An exception, more apparent than real, can be found in the *Pellat* case (1929), R.I.A.A. v, 534, 537, where a Franco-Mexican Mixed Claims Commission held that acts of the government of a Mexican State which had joined a revolution against the federal authorities



Since we are more or less forced to treat the question as if it were a case *primae impressionis*, it is submitted that a State is not liable for any of the acts of rebels whom it cannot control, and that the fact that some of the rebels may still hold official positions under the laws of the *de jure* regime makes no difference. To hold otherwise would lead to arbitrary results and to inequality between States. Suppose rebellions break out simultaneously in State A and State B; State A dismisses the rebels from official positions, but State B is unable to do so because it has a constitutional provision guaranteeing officials security of tenure for life. Would it be fair if third States could claim for injuries inflicted by the rebels in State B, but not by the rebels in State A?<sup>1</sup>

The United Kingdom's failure to dismiss persons holding official positions who have sided with the rebels in Southern Rhodesia does not, by itself, make the United Kingdom liable for any wrongful acts committed by those persons. However, the United Kingdom would be liable if it encouraged holders of official positions to accept the authority of the rebels in any way. It is submitted that something approaching such encouragement may be seen in the following statement issued by the Governor of Southern Rhodesia immediately after the unilateral declaration of independence:

I call on the citizens of Rhodesia to refrain from all acts which would further the objectives of the illegal authorities. Subject to that, it is the duty of all citizens to maintain law and order and to carry on with their normal tasks. *This applies equally to the judiciary, the armed services, the police and the public service.*<sup>2</sup>

And Mr. Wilson said in the House of Commons:

It is our view . . . that it is the duty of public servants to carry on with their jobs, to help to maintain law and order, certainly the judges and the police, at this critical time but that they must themselves be the judges of any possible action which they might be asked to take and which would be illegal in itself or illegal in the sense of furthering this rebellious act. I hope that those who are concerned with, say, hospital administration, education and the normal functioning of government will feel able to carry on; unless and until they reach a point when their consciences tell them that they cannot.<sup>3</sup>

were 'acts of revolutionary forces' and not 'acts of civil authorities', *because the acts had been done for revolutionary ends*. But the dichotomy between the acts of revolutionary forces and the acts of civil authorities was not derived from any general principle, but from the terms of the Convention under which the Commission sat, and which gave the Commission jurisdiction over the acts of revolutionary forces (and made Mexico liable therefor), but not over the acts of civil authorities.

<sup>1</sup> The position would be different in the unlikely event of the claimant's being able to prove that State B's constitutional provision made injuries to foreigners more likely because it encouraged the officials to rebel or hindered the repression of the rebellion.

<sup>2</sup> Text in *Law Quarterly Review*, 83 (1967), pp. 64, 65; [1969] 1 A.C. 645, 714-15. Italics added.

<sup>3</sup> Quoted in *British Practice in International Law* (1965), p. 96. Later another minister told the Commons: 'The World Health Organization has been informed that it may continue, where

These statements have never been revoked.<sup>1</sup> Whatever effect they may or may not have in municipal law, in international law they must mean that the United Kingdom has ratified in advance (and thus accepted liability for) all acts by remaining<sup>2</sup> holders of official positions in Southern Rhodesia, in so far as those acts form part of the normal duties of the persons concerned and are directed towards maintaining law and order and not towards furthering the rebellion. When a State continues to give orders to people holding official positions about the conduct of their duties and those people continue to act in accordance with such orders, the State is estopped from arguing that they are not under its control and that it is not responsible for their actions.<sup>3</sup>

It may be difficult to tell whether a particular act serves to maintain law and order or to aid the rebellion. But there is an even greater problem. The maintenance of law and order by persons holding official positions, and the performance of their normal duties, necessarily imply that such persons should give effect to laws passed by the legislature and sometimes to the instructions of ministers as well. In Southern Rhodesia the *de jure* authorities have dismissed the ministers and forbidden the legislature to act.<sup>4</sup> But how can people holding official positions continue to perform their normal duties unless they continue to give effect to some sort of legislation and some sort of ministerial instructions? And the only 'ministers' and the only 'legislature' which are (or even purport to be) in effective control over Southern Rhodesia are those which owe allegiance to the rebel regime.<sup>5</sup> Consequently, by assuming responsibility for acts done by holders of subordinate official posts in so far as those acts form part of their normal duties, the United Kingdom must also be deemed to have

necessary, to deal on strictly technical or routine matters with Rhodesian officials lawfully appointed before the illegal declaration of independence and acting in the ordinary course of their duties' (ibid., p. 180; and see *Hansard*, H.C., vol. 741, cols. 199-200, 20 February 1967, and vol. 739, cols. 1262-3, 24 January 1967).

<sup>1</sup> The Privy Council in *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645, 730, thought that the Governor's statement had been revoked (albeit only partially) by the Southern Rhodesia Constitution Order (S.I. No. 1952 of 1965). But see Lord Pearce's dissenting opinion at pp. 742-3. In any case the Privy Council was only concerned with the effects of the Governor's statement in municipal law, not international law. See below, pp. 65-6.

<sup>2</sup> This excludes the ministers, who had been dismissed, and the legislature, which had been forbidden to legislate: see above, p. 61.

<sup>3</sup> Some difficulty might arise in the case of persons such as judges, who do not normally take orders from the executive. But in fact, in the unreported decision at first instance in *Madzimbamuto v. Lardner-Burke*, the Southern Rhodesian judges did regard themselves as bound by the Governor's statement: see R. S. Welsh, 'The Constitutional Case in Southern Rhodesia', *Law Quarterly Review*, 83 (1967), p. 64, at pp. 72-3, 76. See also the Privy Council decision, [1969] 1 A.C. 645, 730.

<sup>4</sup> See above, p. 61.

<sup>5</sup> These points were made by Lord Pearce in his dissenting opinion in *Madzimbamuto's case*, [1969] 1 A.C. 645, 738-40. He also pointed out that the United Kingdom, after dismissing Mr. Smith's ministers, appointed no new ministers, gave no detailed instructions to Southern Rhodesian public servants, and stopped paying all official salaries.

accepted responsibility for similar acts on the part of superior bodies whom the holders of subordinate posts could be expected to obey as part of their normal duties. It was by similar reasoning that the Rhodesian High Court (General Division) held that the Governor's proclamation must be interpreted as recognizing a certain authority on the part of the dismissed ministers, as well as maintaining the authority of their subordinates.<sup>1</sup>

It is true that the Privy Council has now ruled that the dismissed ministers have no powers whatever<sup>2</sup> (and, by implication, that their subordinates are not justified in carrying out any of their orders). But the fact that such acts by the ministers and the ministers' subordinates would be illegal at municipal law does not mean that the United Kingdom would not be internationally liable for them. Whether an official's act engages a State's responsibility at international law is determined not by an examination of the minutiae of the municipal law relating to his powers and to the government's vicarious liability in tort, but by reference to the realities of the factual situation—what acts are *normally* performed by the public servant *with the State's acquiescence*? The fact that an official's act is illegal under municipal law may have a bearing on the practical effects of the local remedies rule, but it does not mean that the act cannot also be illegal in international law, any more than municipal law justification is a defence to an international claim.

A case which demonstrates this is the *Speyers* claim.<sup>3</sup> Speyers had imported goods into Mexico under a tariff promulgated by General Avalos, the local military commander engaged in suppressing a rebellion. Mexico later confiscated the goods for non-payment of the tariff imposed by the Mexican Congress, which was different from the Avalos tariff. Mexico argued that the Avalos tariff was invalid and incapable of superseding the tariff imposed by Congress, since Congress was the only body which had the right to impose tariffs under the Constitution; even the President's acquiescence in the face of General Avalos's tariff made no difference, it was said, since the President could not alter tariffs without the consent of Congress. But the umpire held that Mexico had to respect the Avalos

<sup>1</sup> *Madzimbamuto v. Lardner-Burke* (unreported); R. S. Welsh, loc. cit., pp. 72-6. This was one of the bases on which the General Division held that one of the dismissed ministers was entitled to hold the applicants in prison without trial (such detention presumably constituting part of the normal duties of Southern Rhodesian public servants and of the maintenance of law and order, as those terms are understood in Southern Rhodesia). The Appellate Division reversed the decision on a technicality, but went even further than the General Division in attributing power to the dismissed ministers ([1968] 2 S.A. 284). The Privy Council later ruled that the detention was unlawful because the dismissed ministers had no powers at all (*Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645).

<sup>2</sup> See previous note.

<sup>3</sup> *U.S.A. v. Mexico* (1868), Moore's *International Arbitrations*, pp. 2868-70. This and many similar cases are discussed by T. Meron, 'International Responsibility of States for Unauthorized Acts of Their Officials', this *Year Book*, 33 (1957), p. 85; see especially pp. 107-8.



tariff, which was effectively in force in the area in question and had met with acquiescence on the part of the central government.

Imposition of tariffs was obviously so far beyond the powers of a local military commander as to make him a usurper of powers that did not belong to him. But the effectiveness of the tariffs, and the toleration of them by the central government, meant that General Avalos's act was imputable to Mexico, even though the tariffs and the central government's acquiescence were both illegal. Similarly, if the Governor of Southern Rhodesia and the Prime Minister of the United Kingdom permit public servants in Rhodesia to carry out the orders of a usurper, they cannot plead the municipal illegality of the orders, or the ineffectiveness in municipal law of the permission, as a defence to a claim holding the United Kingdom internationally responsible for the execution of those orders by its public servants in Rhodesia.

## V

### *The Southern Rhodesian Loans*

Special problems arise in connection with the loans raised by Southern Rhodesia on the London stock market. The Smith regime has defaulted on the loans, as a sort of reprisal against the sanctions imposed by the United Kingdom. The United Kingdom Government has said that 'the servicing and redemption of all outstanding loans lawfully incurred by the legal Government of Southern Rhodesia . . . remain the responsibility of that Government' and that the United Kingdom Government has not succeeded to such responsibility;<sup>1</sup> but no reason has been given for these statements.

Under international law a State has a limited liability for loans and other contracts entered into by the central government;<sup>2</sup> but it has no liability at

<sup>1</sup> *Hansard*, H.C., vol. 720, Written Answers, col. 108, 19 November 1965; *ibid.*, vol. 722, Written Answers, cols. 233-4, 14 December 1965; *ibid.*, vol. 725, Written Answers, col. 463, 8 March 1966; *ibid.*, vol. 745, Written Answers, col. 154, 11 April 1967. When referring to the Government of Southern Rhodesia, it is clear that the British spokesmen meant the lawful authorities, not the Smith regime. Besides, after dismissing Mr. Smith and his ministers and treating them as rebels, the British Government could hardly tell foreign stockholders to look to Mr. Smith for performance of the obligations of the Southern Rhodesian Government.

<sup>2</sup> F. S. Dunn, *The Protection of Nationals* (1932), p. 167, lists the following cases where a State is liable at international law for breach of contract: '(1) failure to provide adequate remedies in the local courts against breaches by the State; (2) arbitrary annulment by the contracting government without recourse to a judicial determination of the terms of the contract or of the legality of the government's act; and (3) various other 'arbitrary' acts by the contracting government resulting in loss to the private contractor. In all of these cases the distinguishing feature is an *interjection of governmental power* to alter the situation envisaged in the contract. To the extent that one party to a contract is able to do this without the consent of the other party, the expectations created by the contractual relation are defeated.' (Italics added). Default on loans is much less likely to entail liability at international law than breach of other types of contract (E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (1915), pp. 281-2, 302-29).

all for loans and other contracts entered into by its political subdivisions. 'The distinction between the contracts and concessions of the central government and those of subordinate political entities is not dictated by logic but by history';<sup>1</sup> nevertheless, the principle of non-liability for the contractual obligations of political subdivisions is firmly established by State practice,<sup>2</sup> arbitral decisions<sup>3</sup> and academic opinion.<sup>4</sup>

The State is only liable if the central government has participated in the contract in some way,<sup>5</sup> e.g. by guaranteeing performance by the political subdivision,<sup>6</sup> by assuming other obligations under the contract,<sup>7</sup> by authorizing the political subdivision to enter into the contract<sup>8</sup> or by deriving a benefit from the contract (as when the proceeds of a loan or purchase are used for national defence).<sup>9</sup> It should also be noted that the State is liable when the obligations can be characterized as delictual rather than contractual, e.g. in the case of a *forced* loan,<sup>10</sup> or where the courts of the political subdivision interfere with subcontracts entered into by the political subdivision's co-contractor.<sup>11</sup>

So far the Southern Rhodesian loans would appear to fall under the general principle of non-liability rather than under any of the exceptional

<sup>1</sup> *Harvard Research Draft Convention on Responsibility of States, American Journal of International Law*, 55 (1961), pp. 545, 569. The chief historical factor is the shocking record of default by the Southern States, which has made the United States of America reluctant to take up similar claims against foreign States; see B. C. Randolph, 'Foreign Bondholders and the Repudiated Debts of the Southern States', *ibid.*, 25 (1931), p. 63.

<sup>2</sup> G. H. Hackworth, *Digest of International Law* (1943), vol. 5, p. 596. See also Randolph, *loc. cit.*, p. 66.

<sup>3</sup> *Florida Bonds* case (U.K. v. U.S.A.), 1853, Moore's *International Arbitrations*, vol. 4, p. 3594; *Thompson and Nolan* cases (U.S.A. v. Mexico), 1868, *ibid.*, p. 3484; *Thomson-Houston International Electric Co. case* (U.S.A. v. Venezuela), 1903, R.I.A.A. ix, 230; *La Guaira Electric Light and Power Co. case* (U.S.A. v. Venezuela), 1903, R.I.A.A. ix, 240. *Contra*, *Ballistini* case (France v. Venezuela), 1903, R.I.A.A. x, 18, 21: contract for purchase of supplies, no reason given for decision.

<sup>4</sup> Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 200; *Harvard Research Draft Convention on Responsibility of States, American Journal of International Law*, 23 (1929), Special Supplement, pp. 127-8; *ibid.*, 55 (1961), pp. 545, 568-9.

<sup>5</sup> But the mere fact that the central legislature fails to exercise a power to veto acts of the local legislature does not make the State liable, even when the local legislature passes a law repudiating its debts: *Florida Bonds* case, cited in n. 3 on this page.

<sup>6</sup> *Metzger* case (U.S.A. v. Haiti), *Foreign Relations of the United States* (1901), pp. 264, 271. The United Kingdom, as guarantor, has paid interest on Southern Rhodesia's loans from the World Bank: *British Practice in International Law* (1966), p. 31.

<sup>7</sup> *Rudloff* case (U.S.A. v. Venezuela), 1903, R.I.A.A. ix, 244.

<sup>8</sup> *Baasch and Römer* case (Netherlands v. Venezuela) 1903, R.I.A.A. x, 723, 724.

<sup>9</sup> *Beckman* case (Germany v. Venezuela) 1903, R.I.A.A. x, 436; *Baasch and Römer* case (see previous note); *La Guaira Electric Light and Power Co. case* (U.S.A. v. Venezuela), 1903, R.I.A.A. ix, 240, *obiter*.

<sup>10</sup> *Pellat* case (France v. Mexico), 1929, R.I.A.A. v, 534; *Beckman* case (Germany v. Venezuela), 1903, R.I.A.A. x, 436.

<sup>11</sup> *Union Land Co. case* (U.S.A. v. Mexico), 1851 (?), Moore's *International Arbitrations*, vol. 4, p. 3434. The central government had moreover indirectly derived some benefit from the contracts in this case, and the contracts were regulated by federal laws as well as by the laws of a member-State of the federation.

cases of liability. But the arbitral decisions also show that a State is liable for the contracts of a political subdivision if that subdivision is under the close control of the central government.<sup>1</sup> Section 4 (1) of the Southern Rhodesia Constitution Order, 1965, provides in part that 'the executive authority of Southern Rhodesia may be exercised on Her Majesty's behalf by a Secretary of State' and that 'a Secretary of State may exercise any function that is vested by the Constitution or any other law in force in Southern Rhodesia in any officer or authority of the Government of Southern Rhodesia . . . or . . . prohibit or restrain the exercise of that function by that officer or authority'.<sup>2</sup> Is it not arguable that these provisions place Southern Rhodesia under such close control as to make the United Kingdom liable in international law for Southern Rhodesia's contracts?<sup>3</sup>

Although the Southern Rhodesia Constitution Order may be capable in principle of making the United Kingdom liable for Southern Rhodesia's contracts, the question whether the United Kingdom is in fact liable for the loans raised by Southern Rhodesia on the London stock market can only be determined by reference to the terms of issue of such loans. Loans raised on the London stock market are subject to section 19 of the Colonial Stock Act, 1877, which requires the terms of issue of any colonial stock to provide that 'the revenues of the colony alone are liable in respect of the

<sup>1</sup> *Daniel case (France v. Venezuela)*, 1903, R.I.A.A. x, 22, 24, where the town which had made the contract had subsequently fallen under the direct rule of the central government; *Bolívar Railway Co. case (U.K. v. Venezuela)*, 1903, R.I.A.A. ix, 445, 450, where the umpire said:

'The relation of the several States to the national government is . . . so intimate that it becomes difficult to discriminate rightfully between the two . . . The umpire knows that the several States are constituted by the national government and the governors are appointed by the national government and hold their offices at its pleasure; that a certain income is set aside for the support of these State governments; and from such knowledge . . . he is satisfied that, if this account is allowed against the national government and on behalf of the railway company, the national government has such a relation to the State of Lara that it may easily recoup the sum if it is not properly chargeable to it, while if disallowed as against the railway company it is wholly remediless. It appears . . . therefore that it is safe for the national government and just and equitable to the company that the question should be resolved in favour of the railway company . . .'

In the *Rudloff case (U.S.A. v. Venezuela)*, 1903, R.I.A.A. ix, 244, some significance was attached to the fact that the Governor of the Federal District, who had made the contract, was appointed by the central government. But an even stronger reason for holding the central government liable was the fact that it was also a party to the contract and had accepted collateral obligations under the contract.

<sup>2</sup> S.I. 1965/1952.

<sup>3</sup> The fact that the United Kingdom Government has made little attempt to exercise its powers under the Order is irrelevant; what counts is the legal right of control, not its actual exercise. An analogy may be found in industrial law, where a contract of service is defined by reference to the employer's right to control the way in which work is done, regardless of whether or not that right is exercised.

It might be objected that the Southern Rhodesia Constitution Order is a *brutum fulmen*, since the Smith regime is in *de facto* control of Southern Rhodesia. But the United Kingdom, by claiming powers over Southern Rhodesia in the Order, can hardly disclaim the international responsibilities (e.g. for breach of contract) which go with those powers.



stock and the dividends thereon, and that the Consolidated Fund of the United Kingdom and the Commissioners of Her Majesty's Treasury are not directly or indirectly liable or responsible for the payment of the stock or of the dividends thereon, or for any matter relating thereto . . .<sup>1</sup>. Moreover, sections 9 and 10 of the [Southern Rhodesian] General Loans Act, 1963, make the [Southern Rhodesian] Consolidated Revenue Fund exclusively liable for servicing and redeeming loans.<sup>2</sup> Consequently, even assuming that the United Kingdom is liable in principle for Southern Rhodesian debts, its liability is limited to the amount of the assets belonging to the Consolidated Revenue Fund which are under the control of the United Kingdom.<sup>3</sup> The United Kingdom is not obliged to pay interest out of Southern Rhodesian Government assets which do not form part of the Consolidated Revenue Fund. Still less is it obliged to pay interest out of the assets of the Rhodesian Reserve Bank, which has a legal personality separate from that of the Southern Rhodesian Government.<sup>4</sup>

Section 5 of the Southern Rhodesia Constitution Order, 1965,<sup>5</sup> does in fact provide that 'monies may be issued from the Consolidated Revenue Fund on the authority of a warrant issued by a Secretary of State . . .'. Presumably the reasons why no interest has been paid by the United Kingdom are that there were no assets belonging to the Consolidated Revenue Fund situated outside Southern Rhodesia on 3 December 1965, and that no remittances have been received from the Consolidated Revenue Fund since 3 December 1965.<sup>6</sup> The question whether the United Kingdom

<sup>1</sup> 40 and 41 Vict., c. 59. The terms of issue of all the loans raised by Southern Rhodesia do in fact include the provisions required by s. 19 of the Colonial Stock Act. The same is true of the loans raised by the former Federation of Rhodesia and Nyasaland for which Southern Rhodesia accepted liability when the Federation was dissolved.

<sup>2</sup> Act No. 41 of 1963. Section 24 provides that judgments given by Courts in the United Kingdom concerning stock and dividends thereon shall be satisfied out of the Consolidated Revenue Fund, via the Southern Rhodesian Government's account in London.

<sup>3</sup> This includes assets situated in third States which recognize British sovereignty over Southern Rhodesia.

<sup>4</sup> [Rhodesian] Reserve Bank of Rhodesia Act, Act No. 24 of 1964. The United Kingdom has, by Orders in Council, appointed its own nominees to run the Reserve Bank (S.I. 1965/2049 and 1967/478).

<sup>5</sup> S.I. 1965/1952.

<sup>6</sup> This is the date on which the Reserve Bank of Rhodesia Order, 1965 (S.I. 1965/2049; see n. 4 on this page), entered into force. The Smith regime paid interest which fell due on 21 November 1965, and only defaulted after 3 December 1965, in retaliation against the Order. The importance of the Order lies in the fact that the Reserve Bank held all of the Southern Rhodesian Government's external assets. No doubt the reason why the United Kingdom Government has never released any information about the assets of the (Southern Rhodesian) Consolidated Revenue Fund is because of the principle of secrecy which applies to all banking activities; as the Solicitor-General said when a similar question was put to him about the assets held by the Reserve Bank, 'I do not think that I can be expected to give figures, because, after all, we are here dealing with the affairs of a bank' (*Hansard*, H.C., vol. 745, col. 464, 18 April 1967). In the same debate the Solicitor-General also explained that the reasons for the United Kingdom Government's policy of not paying the dividends (presumably *ex gratia*) out of the (other?) assets held by the Reserve Bank were that the assets held by the Reserve Bank should be preserved for the people of Southern Rhodesia as a whole, pending the return to constitutional government, and that it

is liable for the fact that the rebels have prevented money being remitted from Salisbury to London is part of the general question whether a State is liable for the wrongful acts of rebels, and must be answered by deciding whether the State has exercised due diligence in preventing and suppressing the rebellion.<sup>1</sup>

would be unfair to give preferential treatment to the stockholders which was denied to other people who were owed money by Southern Rhodesia (*Hansard*, vol. 745, cols. 465-6).

<sup>1</sup> See above, pp. 50-55. The instructions issued by the British authorities to all holders of official positions in Southern Rhodesia, telling them to carry on with their normal duties (see above, pp. 60-63) are not relevant in this context, because the obstruction of the transfer of funds for paying dividends was done for rebellious motives and was in violation of the officials' duties under the General Loans Act, 1963.

# THE CONDOMINIUM OF THE NEW HEBRIDES\*

By D. P. O'CONNELL

*Professor of International Law, University of Adelaide*

## INTRODUCTION

FROM time to time States with rival claims to territory have attempted to solve their differences by the expedient of joint rule, and it cannot be assumed that disputant States will not seek a like solution in future. A case study of the one important surviving instance of Condominium may, therefore, prove instructive for those who seek to evaluate proposals for joint sovereignty over Antarctica or other controversial areas. Jessup and Taubenfeld<sup>1</sup> claim that the device of Condominium has not proved successful in practice, and that, viewed as an experiment in political administration, the New Hebrides Condominium is a failure. If this contention is correct, international lawyers and political theorists may regard proposals of joint rule with scepticism. But, as this study seeks to show, while joint rule in the New Hebrides has not been an unqualified success, and has incurred criticism and even ridicule, it has not proved unworkable in practice when the will to make it work has been present. At any rate the experiment must be of interest to international lawyers, not least because, as we shall see, the interaction of the British and French systems has produced in effect a conflict of laws situation.

The twelve major islands, eighteen lesser islands and nearly forty islets comprising the Group of the New Hebrides are destined by geography to be a focus of the Western Pacific region, and yet have remained among the most neglected territories in the area.<sup>2</sup> The islanders formerly enjoyed a reputation for savagery, and in the early nineteenth century shipping between Sydney and Canton avoided contact. In 1825, however, sandalwood was discovered on Erromanga, and after 1839 a trade in sandalwood

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<sup>1</sup> Jessup and Taubenfeld, *Controls for Outer Space and the Antarctic Analogy* (1959), p. 11.

<sup>2</sup> On the evolution of the Condominium see Comte, 'La naissance du Condominium des Nouvelles-Hébrides', *Marchés coloniaux*, 9 (1953), p. 2997; Bourge, *Les Nouvelles-Hébrides de 1606 à 1906* (1906); Darille, *La Colonisation française aux Nouvelles-Hébrides* (1895); Politis, *Le Condominium franco-anglais des Nouvelles-Hébrides* (1908) (this last, apart from including the Convention of 1906, repeats the material in the author's articles in the *Revue générale de droit international public*, referred to below); *Naval Intelligence Division Geographical Handbook Series B.R. 519B* (Restricted), vol. iii, pp. 526 et seq.; Morrell, *Britain in the Pacific Islands* (1960), pp. 349 et seq.; Brunet, *Le Régime international des Nouvelles-Hébrides* (1908); *Condominium franco-britannique: juris-classeur d'outre-mer*; Brookes, *International Rivalry in the Pacific Islands 1800-1875* (1941); Roberts, *A History of French Colonial Policy 1870-1925* (1929). H.M.S.O. produces a *New Hebrides Biennial Report*, and each country reports separately to the United Nations.



was organized from Sydney. Permanent depots were established at several points. The Europeans who exploited the trade were lawless, and took part in and even instigated native wars and massacres. Presbyterian missionaries arrived in the central islands in 1848 and then began a long slow tussle with both paganism and the traders, and, after the appearance of Marist missionaries, with France as well.

During the American Civil War a cotton industry was started at Townsville in Queensland, and cheap plantation labour was recruited in the New Hebrides for this, and later, for the sugar industry also. Recruiters were often unscrupulous about their methods and their treatment of the workers, and violence begot violence throughout the Group. Queensland regulated the conditions of New Hebridean recruitment by the Polynesian Labourers Act in 1868; and New Caledonia by an *arrêté* of the Governor of 10 August 1865, which required that all contracts of employment of New Hebrideans in the French islands be approved by the registrar of the court.<sup>1</sup> This *arrêté* marks the beginning of French official interest in the Group.

This official interest was engaged as the result, paradoxically, of the commercial activities in the Group of a French naturalized subject of British birth named Higginson, who had settled in Noumea in 1859, before it became French, and who founded there a trading company which rapidly acquired a paramount position in New Hebridean commerce. When competitors from Sydney and Brisbane encroached on this position Higginson mounted a campaign for French protection. In February 1875 the British settlers on Tanna petitioned the Governor of New Caledonia 'de prendre la dite île Tanna sous la protection du pavillon français en l'annexant à la Nouvelle-Calédonie',<sup>2</sup> in order, they said, to ensure the political stability necessary for capital investment in sugar growing. In the following May the inhabitants of Efate, who included more French citizens in their number than British subjects, dispatched a similar petition. As the transported convicts in New Caledonia were discharged from servitude they tended to migrate to the New Hebrides, which offered more opportunity for making a living. The gradual increase in the number of French settlers in the Group naturally intensified the pressure for French annexation.

The manner in which both Great Britain and France became involved in the New Hebrides is so bizarre as to suggest that history took a cynical revenge on European expansionism. Both Governments were implicated largely by British subjects and Australian investment; but whereas the British interest that sought French protection has in the process of time

<sup>1</sup> *Bibliothèque coloniale internationale*, vol. 3, p. 265; Politis, 'La condition internationale des Nouvelles-Hébrides', *Revue générale de droit international public*, 8 (1901), p. 129.

<sup>2</sup> Politis, *ibid.*, p. 130.

been transformed into a genuine French interest, the British interest that forced the hand of the British Government has always remained Australian, and has lost all real connection with the United Kingdom. From 1870 onwards, public opinion in Australia, judiciously influenced by interested merchants and missionaries, became passionately engaged in a policy of empire-building in the Pacific. Since the Australian Colonies were themselves unable to embark on political adventures in the South Seas, the mother country had to be forced to take action. In 1878 the British and French Governments exchanged Notes<sup>1</sup> in which they acknowledged the pressures both of public opinion in Australia and of the settlers in the New Hebrides, and in which they undertook not to affect what was ambiguously referred to as the 'independence' of the Group. This solution, because it sought to perpetuate a situation of insecurity, was inherently ephemeral.

Although the New Hebrides was left *terra nullius* by this agreement, it would not be correct to suppose that there was no law to regulate events there. In 1872 and 1875 the British Parliament had enacted two pieces of legislation<sup>2</sup> by which jurisdiction might be exercised over British subjects established in the Pacific Islands not subject to the sovereignty of any Power. Pursuant to these laws, Orders in Council were issued in 1877 and 1879<sup>3</sup> creating the office of Her Britannic Majesty's High Commissioner for the Western Pacific, and regulating his powers over these subjects. At first the High Commissioner was also the Governor of Fiji, and in 1881 he issued a notice requiring all British settlers in the islands not already subject to sovereignty to register their land grants either in Australia or in Fiji. Henceforth a British warship was permanently stationed in the New Hebrides to administer the legislation, and its officers intervened in the making of grants of land to British subjects and supervised the drafting of the contracts of sale. British presence in the 'independent' islands thus became real and permanent almost as soon as their 'independent' status had been guaranteed.

The formation of the *Compagnie Calédonienne des Nouvelles-Hébrides* by Higginson in 1882, with a capital of 500,000 francs, was a decisive step towards creating a preponderance of French interest in the Group, and an occasion also of the introduction of a French political presence. Higginson's object was to acquire vast lands in the New Hebrides and settle them on a planned immigration basis. This venture stimulated a reaction in Australia, and an Australian land company was formed to settle Malekula. Throughout 1883 and 1884 Australian and New Zealand pressure on the

<sup>1</sup> *British and Foreign State Papers*, vol. 69, p. 691.

<sup>2</sup> Pacific Islanders Protection Acts, 35 & 36 Vict., c. 19; 38 & 39 Vict., c. 51.

<sup>3</sup> Western Pacific Orders in Council, *British and Foreign State Papers*, vol. 68, p. 325; vol. 70, p. 277.

British Government mounted. The Presbyterian missions sent a delegation to London; and the matter was taken up by the Victorian cabinet, which offered to pay a portion of the cost of British annexation of the Group. On 21 July 1883 the Agents-General of New South Wales, Queensland, Victoria and New Zealand presented a joint memorandum to the Colonial Office demanding annexation of all the unoccupied Pacific Islands. Agitated by this pressure, France in the same month demanded assurances from the British Government that the agreement of 1878 would be respected.<sup>1</sup> The need to reply to this Note induced in the British Government great caution over the colonial demands; which, in consequence, only became more urgent and forceful.<sup>2</sup>

The Anglo-French struggle in the Pacific was complicated by the interest which Germany and the United States were displaying in the area; and a diplomatic solution to the problem had to take into account, not two, but four Powers. Various proposals passed between London and Paris, by which the New Hebrides would be traded to one or other of the Powers in return for a free hand elsewhere in the Pacific.<sup>3</sup> But any suggestion of a deal of this sort was anathema to opinion in the Australian and New Zealand Colonies, and the only result of the exchanges was to rigidify the New Hebridean situation. Eventually, in a dispatch of 15 July 1886, dealing with a British inquiry into events at Port Sandwich and Port Havannah on Malekula, the French Government proposed an *entente commune*, a system of joint police surveillance to guarantee the security of all Europeans in the Group, and the withdrawal of all military forces.<sup>4</sup> This was the genesis of the Condominium. The British Cabinet seized on the proposal as a device for quieting colonial opinion without aggravating the diplomatic situation, and in its reply suggested the creation of a Mixed Naval Commission. On 12 September 1886 the French Government accepted the suggestion and negotiations were begun which resulted in a

<sup>1</sup> Correspondence Concerning French Proceedings in the New Hebrides, 1883, 1884, *British and Foreign State Papers*, vol. 76, p. 388; vol. 79, p. 542.

<sup>2</sup> The question of the Pacific was discussed at the Convention of the Colonies held in Sydney in December 1883 to consider the formation of a Federal Council. Large public meetings devoted to the subject were held at Melbourne and Ballarat in 1884. The Governor of Victoria proclaimed that French encroachment in the Pacific was an affront and a calamity. The Higginson adventure at Port Sandwich was bad enough, but it was followed eighteen months later by two official French military expeditions, one to Port Sandwich and the other to Port Havannah, to punish native aggression against French settlers. In Noumea this aroused so much enthusiasm that the *Conseil-général* of the Colony was called into extraordinary session and demanded '*l'annexion immédiate et sans conditions*' of the New Hebrides; in Australia violent protests were made to the Colonial Governments by the Presbyterian church organizations; Politis, loc. cit., p. 136. The details are taken from Deschanel, *Les Intérêts français dans l'océan Pacifique* (1888), pp. 253 et seq. There is a brief account in Mander, *Some Dependent Peoples of the South Pacific* (1954), p. 466.

<sup>3</sup> Details will be found in *Livre jaune, documents diplomatiques: Affaires des Nouvelles-Hébrides et des îles Sous-le-Vent de Tahiti* (1887).

<sup>4</sup> Ibid.; Politis, loc. cit. (above, p. 72, n. 1), p. 147.



Convention of 16 November 1887;<sup>1</sup> this constituted a Joint Naval Commission, composed of British and French naval officers on the Pacific Station, charged with the duty of maintaining order and of protecting the lives and property of British subjects and French citizens in the New Hebrides.

It was not long before the Joint Naval Commission earned the settlers' contempt. Its ships were removed to Noumea or Sydney during the five months of the hurricane season each year, so that its intervention in local squabbles was spasmodic and perfunctory. It provided some protection in the more developed settlements, but it was incapable of supplying the want of administration, civil law and investment security (French citizens even had to go to Noumea to marry). These wants the settlers sought to provide themselves. At Franceville (now Port Vila) and Faureville (now Mélé) they organized communes, and on 9 August 1899 informed the Royal Navy, and the Governments of Fiji and the Australian Colonies, that the former of these islands was independent. It even adopted its own flag. However, a few months later the French naval officer on the Joint Commission decided that this action was a violation of the understanding between the Powers, and ordered the dissolution of the Franceville Commune.<sup>2</sup> The Faureville Commune survived for some years. In 1895 a local arbitration court had been set up, but the Joint Naval Commission suppressed it also. Thus the Commission merely intensified the existing legal vacuum, and legal problems accumulated as the land development companies, both French and Australian, their momentum and their capital expended, crashed one by one.<sup>3</sup> In 1901 an attempt by Australian interests to buy up French bankrupt interests for 450,000 francs was forestalled by the French. Clearly events had overtaken the machinery of the Joint Naval Commission, and an intensification of the Anglo-French presence could not be delayed. In 1900 France took steps to introduce French law into the Group with respect to its own citizens, thus complementing the action of the British Government in 1893.<sup>4</sup> Two years later both Governments appointed Resident Commissioners at Port Vila, but this seems only to have stimulated local demands for French annexation.

The general settlement of outstanding colonial questions between Great Britain and France that constituted part of the Entente Cordiale could work in the New Hebrides only by joint rule. On 8 April 1904 an Anglo-French Declaration<sup>5</sup> was made which anticipated the theory of 'sphere of joint

<sup>1</sup> *British and Foreign State Papers*, vol. 79, p. 545.

<sup>2</sup> Politis, loc. cit. (above, p. 72, n. 1), p. 249; Hagen, 'Études sur les Nouvelles-Hébrides', *Bulletin de la Société de Géographie de l'Est* (1893), p. 268.

<sup>3</sup> Hagen, *ibid.*; Brunet, op. cit. (above, p. 71, n. 2), p. 80. The trading situation was the subject of a naval report, Cd. 2714, 1906.

<sup>4</sup> *Bulletin officiel du Ministère des Colonies* (1900), p. 665. See below, p. 118.

<sup>5</sup> *British and Foreign State Papers*, vol. 97, p. 53.

influence' that was to underlie the Convention of 1906.<sup>1</sup> This latter agreement created the Condominium, more or less in its present form. In essence it did little more than add listed joint services to those already provided by the two Governments for their own nationals, and a judicial system to deal with matters that would not fall within either national jurisdiction. As far as possible it aimed to utilize governmental machinery which already existed. For example, the joint authority was vested in the High Commissioners, who already exercised the respective national authorities; and since there were already Resident Commissioners at Port Vila to act as agents of the High Commissioners, these were envisaged as constituting the actual government of the joint services. The complicated legal relationship between the High Commissioners and the Resident Commissioners was never clearly formulated, and remains ambiguous today.

The Condominium thus assumed its form by a series of accidents and through patching together a variety of institutions separately created and never intended to work with each other. The new regime appears to have faltered as soon as it began to function. Administration of justice was as often as not ridiculed by the European population, and scandals and abuses multiplied.<sup>2</sup> Questions were asked in the House of Commons, and eventually the intense feeling of the British residents culminated in a manifesto of the Protestant missionaries.<sup>3</sup> Negotiations began between the British and French Governments for a revision of the Convention so as to strengthen the hands of the administration. A conference was called in London in the middle of 1914, and it produced a variant of the Convention, called the Protocol,<sup>4</sup> which is the present constitution of the Condominium. This document did little to increase the effectiveness of the Condominium government, or to add to the authority of its institutions. The war interrupted the process of implementing the new agreement, which was not ratified until March 1922. Its introduction in the Group altered nothing. For many years the administration stagnated, while the depression aggravated the economic decay. By the outbreak of the Second World War the

<sup>1</sup> *British and Foreign State Papers*, vol. 99, p. 229. The Convention was ratified on 9 January 1907. On 2 December of that year Sir Everard im Thurn proclaimed it at Port Vila. 'We meet today', he said, 'to make history. We are, today, starting a remarkable and absolutely new experiment in the joint yet separate administration by two great Powers of one area. . . . Henceforward Frenchmen and Englishmen will live intermingled, each enjoying the benefit of the laws of his own nation and submitting matters of inextricably common interest to the Joint Administration and both joining together to rule the natives of these islands.'

<sup>2</sup> Jacomb, *France and England in the New Hebrides* (1914), pp. 74 et seq. The Governments of Australia and New Zealand were dissatisfied with the arrangement that the nationals of each Power would remain subject to their own laws. They wanted a uniform law to protect their citizens from French exploitation: Cd. 3288; Morrell, op. cit. (above, p. 71, n. 2), p. 359.

<sup>3</sup> *A Plea to the Anglo-Saxon Race to Insist upon Fair Play for Black and White; Under Two Flags; a Hopeless Experiment and a Grave Scandal*.

<sup>4</sup> *British and Foreign State Papers*, vol. 114, p. 212; Harrison, *Savage Civilisation* (1937).

New Hebrides gave the impression of not having advanced beyond the achievement of 1900, and, indeed, of having squandered that achievement, such as it was, by neglect.<sup>1</sup> Not surprisingly, every author who commented upon the Condominium between 1906 and 1954 criticized or ridiculed it.<sup>2</sup> Since 1954 the situation has altered dramatically, and it is now possible to present a more favourable and more promising picture.

## THE INTERNATIONAL STATUS OF THE NEW HEBRIDES

### I. The Attempted Definitions of Condominium

In none of the basic constitutional instruments governing the status of the New Hebrides is the expression 'Condominium' used, but all administrative documentation has consistently been headed 'Condominium of the New Hebrides', and, at least informally, the word has become part of the title of the Group. The concept of Condominium first makes its appearance in the later stages of the evolution of the Holy Roman Empire, where it was employed to designate the exercise jointly of their proprietorial rights (to which constitutional rights were attached) over specific towns and lands by two or more of the sovereign princes.<sup>3</sup> At that stage of its history it correctly implied co-proprietorship, or joint *dominium*, because the situation it designated was in essence feudal occupation of estates. Later, in the nineteenth century, it was divorced from this property connection and employed to characterize the quite different situation where two or more sovereign States jointly ruled territory.<sup>4</sup> The correct expression would have been *co-imperium*, but as this was used to designate the situation where two or more States jointly exercised sovereignty over the territory of a third State<sup>5</sup> (such as, perhaps, the situation resulting from Allied rule of Germany after the Second World War), it was conceptually pre-empted. The term Condominium, then, came to be employed to cover

<sup>1</sup> In 1928 the copra production in the New Hebrides was valued at £209,000, not much less than its value today. In 1934 it was £24,000. In 1927 the British Government provided £16,048 for its separate administration, and in 1934 £8,615. In that year the revenue of the Condominium was £23,362.

<sup>2</sup> In addition to Harrison and Jacomb, the following are also critical: Belshaw, *Island Administration in the South West Pacific* (R.I.I.A. publication, 1950) and *The Future of the New Hebrides Condominium*; 'Neglect in the New Hebrides', *Empire*, vol. 10 (1948); 'The Solomons and New Hebrides. Some Proposals', *ibid.* (4-5 April 1948); Cumberland, *South West Pacific* (1954), p. 165; Mander, *Some Dependent Peoples of the South Pacific* (1954), pp. 489 et seq.

<sup>3</sup> Coret, *Le Condominium* (1960), p. 6; Schneider, 'Condominium', in Strupp-Schlochauer, *Wörterbuch des Völkerrechts* (1960), p. 297. In 1682 a work appeared by Fromman called *Tractatio de condominis territorii*, published in Tübingen. This was followed by a work by Hoffman, *De Condominio*, in 1776.

<sup>4</sup> As in the Condominium of Prussia and Austria over Schleswig-Holstein and Lauenburg in 1864.

<sup>5</sup> Pilotti in *Revue de droit international, de sciences diplomatiques et politiques*, 4 (1941); Caviglieri, in *Recueil des cours*, 26 (1929), p. 384.



all types of regimes involving joint exercise of sovereignty, whether on a basis of equality or inequality.

The New Hebrides is, in fact, along with the Phoenix Islands, the only instance where Condominium involves joint government on a basis of strict equality over territory which was not already a legally organized polity; and it might almost be said, therefore, to be the classical instance.<sup>1</sup> But this is to presume that there are some inherent characteristics in the concept of Condominium, or that the expression is a touchstone by which the incidents of a Condominial regime are to be isolated and evaluated. It is often taken for granted, in both governmental documentation and the writings of publicists, that because a territory is designated a Condominium—because, in other words, the term purports to be constant in meaning and sufficiently definitive to permit specific implications to be drawn—it must possess certain qualities and features that are peculiar to all Condominia.

The institution of Condominium has received inadequate treatment from almost all writers of textbooks on international law. The most fruitful contributions to its elucidation are those of Verdross, who wrote on the subject only incidentally,<sup>2</sup> El Erian, who studied the case of the Sudan,<sup>3</sup> Aglietti, who wrote about both the Sudan and the New Hebrides,<sup>4</sup> and Coret, who wrote a doctoral thesis on the topic.<sup>5</sup> Other writings<sup>6</sup> are ambiguous, and not particularly illuminating. Almost all authors have sought to define Condominium, failing to recognize that if the term is used merely as a summation of the characteristics of a regime laid down

<sup>1</sup> The legal position of the New Hebrides was discussed by Politis in *Revue générale de droit international public*, 8 (1901), pp. 121 et seq.; 230 et seq.; and 755 et seq.; Brunet, *Le Régime international des Nouvelles-Hébrides* (1928); Grignon-Dumoulin, *Le Condominium et la mise en valeur des Nouvelles-Hébrides* (Thesis; Paris, 1928).

<sup>2</sup> In *Recueil des cours*, 30 (1929), p. 365. And in *Zeitschrift für internationale Recht*, 37 (1926), pp. 293 et seq.

<sup>3</sup> *Condominium and Related Situations in International Law* (1952).

<sup>4</sup> 'Il governo di alcuni condomini: Sudan anglo-egiziano, Nuove Ebridi, Tangeri', *Biblioteca di studi coloniali*, 7 (1939).

<sup>5</sup> Op. cit. (above, p. 77, n. 3).

<sup>6</sup> Basdevant, in *Recueil des cours*, 58 (1936), p. 592; Berber, *Lehrbuch des Völkerrechts* (1960), vol. 1, p. 300; Bourquin, in *Recueil des cours*, 35 (1931), p. 116; Cavaré, *Le Droit international public positif* (2nd ed., 1961), vol. 1, p. 476; Cavaglieri, in *Recueil des cours*, 26 (1929), p. 388; Dahm, *Völkerrecht* (1958), vol. 1, p. 554; Dendias, in *Recueil des cours*, 63 (1938), p. 273; Fauchille, *Traité de droit international public* (1922), vol. 1, pt. 1, p. 684; François, in *Recueil des cours*, 66 (1938), p. 40; Gould, *International Law* (1957), p. 191; Guggenheim, *Traité de droit international public* (1953), p. 437; Jessup and Taubenfeld, op. cit. (above, p. 71, n. 2), p. 11; Lauterpacht, in *Recueil des cours*, 62 (1937), p. 322; L'Huillier, *Éléments de droit international public* (1950), p. 268; Oppenheim, *International Law* (8th ed., 1955), p. 453; Podesta Costa, *Manual de derecho internacional público* (2nd ed., 1947), vol. 1, p. 83; Ripert, in *Recueil des cours*, 44 (1933), p. 634; Rolland and Lampué, *Précis de droit des pays d'outre-mer* (1952), p. 123; Rousseau, *Droit international public* (1953), p. 256; Schwarzenberger, *Manual of International Law* (5th ed., 1967), pp. 58, 260, and in *Recueil des cours*, 87 (1955), p. 218; Sereni, *Diritto internazionale* (1958), vol. 2, p. 566; Sibert, *Traité de droit international public* (1951), vol. 1, p. 388; Tripel, *Völkerrecht und Landesrecht* (1899), pp. 67, 337.

specifically by treaty, it comprehends the conclusions drawn from analysis, and is not the major premiss from which analysis proceeds; in such a case Condominium defies definition. Some authors emphasize the mixing of competence,<sup>1</sup> others the indivisible character of joint rule;<sup>2</sup> some the Statal character of joint sovereignty;<sup>3</sup> others the international or community character thereof;<sup>4</sup> one group argues from the theory of the State,<sup>5</sup> the other from the theory of international society;<sup>6</sup> some writers highlight the subjection of the Condominial territory to Condominium rule,<sup>7</sup> others the reservation of jurisdiction over the nationals of each party;<sup>8</sup> some emphasize rule through organs of the two parties,<sup>9</sup> others concede the territory to have its own organs;<sup>10</sup> some emphasize the divisibility of sovereignty,<sup>11</sup> others its unitary character;<sup>12</sup> some contend that the territory belongs to neither party,<sup>13</sup> others that it belongs to both;<sup>14</sup> some exclude property analogies,<sup>15</sup> others import them.<sup>16</sup>

The only constant notion in the literature is that the term Condominium has been used to denote a territory, and the people living on that territory, ruled jointly by two or more powers. Van Asbeck identifies it in the case of the New Hebrides, with 'colony'.<sup>17</sup> However, a Condominium is not a colony governed or looked after solely by one power. Certainly it is one of the many varieties of 'non-self-governing territories', but it is not a dependency of either of the ruling countries in the usual sense of the term. In short, the concept of Condominium raises questions of baffling complexity. It is even doubtful whether it can be explained in terms of the classical notions of statehood and sovereignty: a Condominium is not a State, and it is neither dependent nor independent. Many authors have sought to explain it in terms of joint or common ownership, but the explanation is consistent with only one of the several theories of territory current in international law, namely, the theory that territory is property of the State; and it is contradicted by the theory that territory is merely the physical sphere within which sovereignty is exercised.

In any event, it may be doubted whether the private law analogy of

<sup>1</sup> Basdevant, Jessup and Taubenfeld, Lauterpacht, Rousseau, Sibert.

<sup>2</sup> Berber, Gould, L'Huillier, Repert.

<sup>3</sup> Cavaré, Cavaglieri, Dahm, Rousseau, Schwarzenberger, Rolland and Lampué, Sereni, Sibert, Triepel.

<sup>4</sup> Dendias, Verdross, Lauterpacht, Repert.

<sup>5</sup> Basdevant, Berber, Bourquin, Cavaré, François, Lauterpacht, Repert, Rousseau, Schwarzenberger, Sereni, Sibert, Triepel.

<sup>6</sup> Dahm, Dendias, Guggenheim, Verdross.

<sup>7</sup> Guggenheim, Sereni.

<sup>8</sup> Dendias, Lauterpacht, Oppenheim.

<sup>9</sup> Cavaré, Rousseau, Sereni, Rolland and Lampué.

<sup>10</sup> Cavaglieri, Dahm, Guggenheim, Verdross.

<sup>11</sup> Berber, Lauterpacht, Podesta Costa.

<sup>12</sup> Bourquin, Fauchille, François, Repert.

<sup>13</sup> Berber, Dahm, Verdross.

<sup>14</sup> Bourquin, Sibert, Schwarzenberger.

<sup>15</sup> Basdevant, Berber, Bourquin, Cavaglieri, Dahm, François, Guggenheim, Lauterpacht, Rousseau, Sereni, Sibert, Rolland and Lampué.

<sup>16</sup> Oppenheim, Triepel.

<sup>17</sup> In *Recueil des cours*, 61 (1937), pp. 10, 28.

joint or common ownership sheds any light on the legal incidences of Condominium.<sup>1</sup> Study of the law of co-proprietorship in the common-law and in civil-law countries yields no more than propositions concerning ownership of the whole or ownership of moieties by each proprietor; of the incapacity of each proprietor to dispose of the whole, and his capacity to dispose of his own interest; and of the right and limitations upon separate entry, enjoyment, use and abuse. None of these incidences of dominion appear to be in any way instructive when the relationship of sovereign States to each other and to the territory which they jointly rule is under discussion. Territory subject to Condominium is certainly not the 'property' of the joint rulers. Whereas a co-proprietor may dispose of his separate interest without the consent of his partner, a contracting party to a Condominium cannot do so without a breach of treaty obligations, simply because treaties establishing Condominium do not provide a legal basis for individual proprietorship of each party, but generally prescribe mutuality of interests and the need for joint action in matters which affect the territory as a whole: it is inconceivable that Great Britain could assign its interest in the New Hebrides to Australia without France's consent embodied in a new treaty.

The object of analogizing private law concepts and international law questions is nearly always to attract to the latter's solution the conclusiveness and authority which attach to the notions of a standardized and mature legal system. But importation of private law analogies sometimes, far from clarifying, serves only to confuse. The question of the ultimate ownership of land in the New Hebrides affords an instance of this. Most of the hinterland in the islands is unregistered, indeed unclaimed. Does it 'belong' to the Condomini jointly or in common? Or is it *terra nullius* available for occupation by any comer? Or is it owned by the indigenous population? Where the lands are inhabited and in possession the accepted view in the administration is that they belong to the occupiers. Where they are not inhabited it is not presumed that they belong to the Condomini, who would, it seems, lack legal competence to deny title to any occupier. If Condominium imported property conceptions of territory this hypothesis would not be valid.

The same problem respecting the ultimate title to land distinguishes at

<sup>1</sup> El Erian, *op. cit.* (above, p. 78, n. 3), pp. 70 et seq., states that *dominium* in international law is the equivalent of territorial sovereignty. Coret, *op. cit.* (above, p. 77, n. 3), p. 16, contends that this involves a confusion between *dominium*, or actual ownership by the State, and *dominium eminens*, or the right which a sovereignty has respecting the property of its subjects (a distinction adumbrated by Martens, *Traité de droit international* (Fr. trans. by Léo, 1883), vol. 1, p. 452); Coret then proceeds by way of dilemma. If El Erian adheres to the conception of 'pure *dominium*' he contradicts his conclusion that Condominium is not an *îlot* founded on private law; if he accepts the *dominium eminens* alternative he invalidates the argument that private law is relevant in solving public law problems.



least some types of Condominium from a Protectorate. In the case of a protected State the territory is already an established legal entity, whose faculties are, in part, exercised representationally by the protecting State. The extent and quality of these faculties is determined initially by the constitution of the dependent State. It is this constitution—antecedent to the instrument of protection—which determines the disposition of the land. Some Condominia have approximated to protection in this respect, particularly the Condominium of Great Britain and Egypt over the Sudan, but the Condominium of the New Hebrides clearly does not. All the faculties of sovereignty in this case derive from the Condomini, and beyond them there is a legal vacuum. This makes it clear that the concept of Condominium is unstable and incongruous, and that each regime of joint supremacy is *sui generis*.

Coret, criticizing the efforts of some publicists to formulate a generic concept of Condominium, points out that an excessive concentration on the territorial aspects of the institution distorts an achievement which is much richer. Condominium, he says, implies a personal competence, that is, one which relates to public services.<sup>1</sup> Although theoretically this could derive from ownership of the soil, practically this is impossible when, as in the New Hebrides, the competence is exclusively national; when, for example, British subjects are governed only by the British administration, and French subjects only by the French administration, and both fall under the joint administration only in respect of restricted subject-matters defined by the instrument of Condominium.

Some writers contest the coexistence of two sovereignties in a Condominium as a contradiction of the notion that sovereignty imports an ultimate competence, and argue instead for one sovereignty whose attributes are partitioned, or exercised by two Powers at different times and in respect of different subjects or subject-matters.<sup>2</sup> This distinction has been criticized on the ground that it is tautological; it substitutes 'sovereignty' for 'jurisdiction'; it confuses separate jurisdiction with joint jurisdiction; and it reduces political sovereignty to an aggregation of its attributes: Coret points out that the question is not one of common exercise of a common sovereignty, but of the separate exercise by each of the Condomini of the attributes of sovereignty.<sup>3</sup> In fact in the New Hebrides the attributes of joint sovereignty and of separate sovereignty coexist, the occasions of their respective exercise, and the boundaries between them, depending on the governing instrument.

<sup>1</sup> Ibid., pp. 19, 36, 37. Coret argues that there is an inherent contradiction in the notion that a State may exercise sovereignty jointly, and yet be limited in the exercise of the attributes of sovereignty by the identical exercise of the same attributes by another State.

<sup>2</sup> Accioly, *Traité de droit international public* (1940), vol. 1, p. 257.

<sup>3</sup> Coret, *op. cit.* (above, p. 77, n. 3), pp. 35, 36.

## 2. The Problem of the Legal Identity of Condominial Territory

The theory that States only are the subjects of international law is now widely rejected, and it is conceded that legal orders which are regionally integrated might be the beneficiaries of the institutions of international law even if they are not themselves legal actors. Condominial territories are juridically distinct from the territories of either Condominus, and this led Lawrence to propose that

. . . a territory may be held in *condominium* by two or more powers . . . By this is meant, not that there are two sovereigns over the same territory—a thing which by the nature of the case is impossible—but that the one sovereignty is vested in a body made up of the governments of the two powers that exercise the condominium.<sup>1</sup>

Is it possible to regard this 'body' as a subject of international law? The difficulty which most writers have experienced in reaching an affirmative answer stems from the use of the expression 'international personality' to cover the active as well as the passive elements in international legal relationships. Clearly the active agents in Condominium are the Condomini. They make treaties for the territory; and if they breach them, or interfere through the Condominial administration with alien property, or wrongfully arrest a foreign ship in Condominial waters, it is they who are internationally liable to make amends and are responsible in international law for failing to do so. But it is in respect of the passive aspect of international personality that Condominial territory is juridically separate from the respective metropolitan territories. Treaties of the Condomini do not apply to the territory unless specifically applied. When so applied they confer advantages on the territory, perhaps in the form of commercial privileges respecting territorial goods and the inhabitants. Such treaties are international contracts affecting the Condomini, but they look to the Condominial territory and not to the metropolitan territories as the beneficiary.

This consideration suggests that the most fruitful line of inquiry is with respect to the organizational entity created by the Condomini, and called the Condominium. Is it possible to distinguish this entity in international law, drawing an analogy between it, as a treaty creation, and regional political organizations which are also the product of treaty? Verdross, in almost the only illuminating passage in all the international law literature on the subject of Condominium, suggests that one can.<sup>2</sup> He emphasizes the need to detach the problem of Condominium from the notion of the State, and from the concomitant notion of sovereignty; and the importance of linking it with the theory of international community.

<sup>1</sup> *The Principles of International Law* (7th ed., 1920), p. 171.

<sup>2</sup> In *Recueil des cours*, 30 (1929), p. 321.

The world, in Verdross's conception, consists of an integration of partial international communities, such as customs unions and other Statal compositions, in a full community. Condominium he includes in the concept of 'a community of States' exercising sovereignty over territory.<sup>1</sup>

Coret, pursuing Verdross's line of thought,<sup>2</sup> essays a definition of Condominium, which, as a definition may be criticized by logicians, but does isolate the elements required for a theory of the separate personality of Condominial territory. He writes:

Le condominium est le status d'un territoire à l'égard duquel la jouissance et l'exercice des compétences reconnues aux États par le droit des gens, appartient à une communauté internationale partielle caractérisée par l'égalité juridique et fonctionnelle des États qui en sont membres, cette communauté exerçant ses compétences par l'intermédiaire d'organes internationaux particuliers, immédiats ou médiats.<sup>3</sup>

This definition attributes triple characteristics to the organs of Condominial government: they are international organs in the sense that the enjoyment of competence belongs to the *communauté internationale partielle condominante*, and not to one of the member States of the community; they are particular in the sense that they do not constitute international organs but organs of particular international law, reflecting the 'partial' character of the *communauté internationale condominiale*; and they are either immediate or mediate. The immediate international organ is that designated by the treaty which creates the Condominium, and which exercises the competence of the *communauté internationale partielle condominante*. The fact that the member States of this community appoint the competent persons does not affect the international character of the organs of Condominial government, but merely shows that one is faced with *un organe international particulier immédiat, à désignation indirecte*. The mediate international organs are those which, consequent upon the duplication of services, exercise their competence in the Condominial territory, although they properly belong to each of the member States.

This theory enables one to isolate the Condominial government as an organ of an international personality distinct from the personalities of the Condomini. As Verdross says:

Dans un condominium, les sujets sont également soumis, non pas à des règles étatiques, mais aux actes créés par un organe d'une communauté d'États plus ou moins large, donc par un organe international. Ou pourrait peut-être réunir toutes les règles qui précèdent sous le nom de droit interne créé par un organe international.<sup>4</sup>

However, the distinction adumbrated by Coret between immediate and mediate organs of the Condominial community becomes elusive when

<sup>1</sup> Ibid., p. 396.

<sup>2</sup> Coret, op. cit. (above, p. 77, n. 3), pp. 55 et seq.

<sup>3</sup> Ibid., p. 55.

<sup>4</sup> Loc. cit. (above, p. 82, n. 2), p. 311.



applied to the New Hebrides. Coret expressly states that the national services in the New Hebrides are not mediate organs of the Condominium; for they involve, not a dual exercise of Condominial functions, but an exclusive exercise of the functions of organs peculiar to France and Great Britain. He says that one might be tempted to argue that the two Powers are conceded this competence by the Condominial community, in whom logically it is originally vested; but, he answers, international competence is always a matter of international law, and national competence a matter of constitutional law; and in the New Hebrides the national services do not exercise an international jurisdiction.

In elaborating the thesis of Condominial community, Coret does not intend to argue that the Condominial territory is thereby a separate person in international law. Personality in his view is an active attribute, and thus descriptive of the entities which make international law. It does not follow, however, in Coret's view, that Condominial territory is not a passive subject of international law, 'ou membre irrégulier du droit international condominial particulier'. An international person, he says, is a legislator; but particular territories, like particular categories of individuals, may be the subjects of the legislation. Condominial territory is such a subject, even though it is not a participant in international legislative activity, and even though it is only mediately affected by the activity of the Condomini, and not immediately of its own instrumentality.

There is no novelty in a thesis that a group of States can create an international regime for territories, and thereby achieve their juridical separation from the international legal identities of the States which govern them. The case of South West Africa is in point. In all administrative respects it is governed by South Africa; but the burden of the decision of the International Court of Justice in the *International Status of South-West Africa* case is that it is not in international law part of the Union, and is in fact governed by an international regime. As Judge McNair said in this case:

From time to time it happens that a group of Great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international régime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence.<sup>1</sup>

If such a regime of international law significance can be created by action of several States, it can also be created by the action of two States; and the result is no less the creation of what Verdross calls a partial international community.

<sup>1</sup> *I.C.J. Reports*, 1950, p. 153.

### 3. The Practical Implications of the International Legal Status of the New Hebrides

Clarification of the French view on the severance of the New Hebrides from the legal orders of the two metropolitan territories was required when the French Empire was transformed in 1946 into the *Union française*. Did the New Hebrides fall within any of the categories of territories constituting the Union? This question was referred to the *Comité juridique de l'Union française*. The latter prefaced its opinion by a reference to the first Article of the Protocol of 1914, which states that the New Hebrides constitute 'a region of joint influence' (*un territoire d'influence commune*). This excluded the possibility of its being a *département d'outre-mer*, or a *territoire d'outre mer* within the meaning of Article 60 of the Constitution of the Fourth Republic,

. . . car le régime international et d'influence partagée auquel il est soumis ne permet pas de la considérer comme incluse dans la République française.

It also excluded the possibility of its being an *État associé*, for the Condominial territory *manque à l'évidence d'une organisation étatique et gouvernementale propre*. The opinion then proceeded to point out that the only possible category into which the New Hebrides could be put was that of *territoire associé*, which the Constitution had failed to define, and which was an expression of the greatest latitude:

Cette incertitude concernant la catégorie des territoires associés permettrait de soutenir que les Nouvelles-Hébrides rentrent à ce titre dans l'Union française, non pas d'une façon totale puisque l'archipel est soumis à un régime de condominium, mais *parte in qua*, c'est-à-dire dans la mesure de l'influence qu'y exerce la France, sans préjudice d'un rattachement semblable à l'Empire britannique.

Under the terms of Articles 62 and 65 of the Constitution, the opinion concluded, the French Government exercised a certain plenary and exclusive competence in respect of the Union. But it could not exercise this with respect to the New Hebrides, because of the Condominial regime. Therefore, the New Hebrides could not be considered as forming part of the *Union française*.<sup>1</sup>

<sup>1</sup> *Revue juridique et politique de l'Union française*, 2 (1948), p. 241. Commenting on the proposal to include the New Hebrides in the Union, Coret says that this would have been a null and void action in French constitutional law for it would have transformed a partial international community into one of unequal character for the benefit of one member thereof; *op. cit.* (above, p. 73, n. 3), p. 185.

In 1926 the French Government referred to the Condominium functions as 'minimal': Kiss, *Répertoire français de droit international public*, vol. 2, s. 841. On 28 August 1951 the *Assemblée de l'Union française* received an opinion from the *Commission des relations extérieures* on a plan of industrial and agricultural modernization of the New Hebrides, in which it was stated that in matters of health and education France could proceed independently, but that agreement would be needed with the United Kingdom for development in matters of public works, bridges, ports and harbours; *ibid.*, s. 844.

The legal status of the Condominium was raised before the French National Court in the New Hebrides in a case in which the Condominium sued for recovery of the cost of hiring alternative transport, necessitated by damage negligently caused to the vehicle of a French District Agent.<sup>1</sup> The defence was that the Condominium was not a legal person competent to sue or be sued. In his decision of 8 December 1960 the French judge doubted whether the Condominium could be regarded as a *personnalité morale* of French law. He reviewed the facts and found that the Condominium Government made contracts, bought land, had instrumentalities of administration and its own budget; but the question whether or not it was merely an administrative agency of the Condomini, or a separate juridical entity, was, he held, a political matter on which he could not pronounce. Subsequently the question was referred to the French Ministry of Foreign Affairs. The Ministry replied on 1 August 1961<sup>2</sup> that the Condominium was not a *personnalité morale* in French *droit administratif*, but it was an international legal person, and hence was competent to appear in court. The grounds for the distinction drawn by the Ministry between the Condominium's being an international legal person and a legal person in French law were as follows: All the legal persons known to French law, diverse as they are, are connected with territory which is subjected only to the French national competence. The New Hebrides is not such a territory, for it is allocated to no determined State, is neither purely British nor purely French, but is subject to an exercise of joint power on a footing of equality. It is just as vain to inquire whether the New Hebrides is a legal person of public law as to inquire whether other collectivities, such as Andorra, merit this qualification.

But this would not exclude the possibility of the Condominium's being an entity in some other legal system. Since the regime of the Condominium is fundamentally international, it follows that it is the rules of international law which must be resorted to for clarification of this issue. The Ministry considered that the expression 'subjects of international law', with which international lawyers are familiar, is the equivalent in international law of 'persons' in private law. The question, then, was whether the Condominium is a subject of international law. The answer, in the Ministry's opinion, is not in doubt: 'Subjects of international law are States, and other entities recognized by them as having this quality.' The expression 'territory of joint influence' in the Convention of 1906 constituted the New Hebrides a juridical entity in international law, and confirmation of this title has been accorded by the formal or tacit international recognition of

<sup>1</sup> *Affaire Nguyen Ngoc Thoa*. Unreported.

<sup>2</sup> *Ministère des Affaires Étrangères*, Fiche No. 513. Pending this advice the case before the French judge was held over, but as the defendant paid the damages no judgment was given.



the Condominium by other States. It follows that the Condominium exists in international law as a subject of law, capable of exercising the rights which the Signatory Powers conferred on it. The situation was found to be analogous to that of Morocco under French Protection, the international status of which was acknowledged by the International Court of Justice.<sup>1</sup>

The question whether the Condominium has passive as well as active personality, that is, whether it might be sued as well as sue, was left ambiguous in the Foreign Ministry's opinion, and a judge of the Joint Court in the New Hebrides, in a note on the judicial organization in the Group, has expressed doubt. He writes:

Ainsi s'est trouvé établi incontestablement le droit d'agir en justice dont est titulaire ce territoire d'influence commune. La formule est toutefois assez ambiguë pour laisser imprécis le point de savoir si cette capacité se double d'une capacité passive, si ce territoire peut être cité en justice comme défendeur. Dans l'affirmative (solution admissible puisque, d'une façon générale les tribunaux reconnaissent beaucoup plus facilement la capacité passive que la capacité active) la détermination du tribunal compétent constituerait un autre délicat problème en raison de l'imprécision du Protocole en ce domaine.<sup>2</sup>

Although the British and French administrations both take the view that the Condominium enjoys jurisdictional immunities in its own courts, the question has been raised why the Powers would have wished to deprive their subjects of rights of suit which they would have granted them in their own countries. In French law rights are vested in the private citizen against the State, and an elaborate system of judicial administrative courts exists to enable these to be tested and enforced. The fact that there exists in the New Hebrides no system of administrative courts, and no code of administrative law, is not in itself fatal to the view that the Condominium could be sued in the Joint Court, for in French law the civil courts are competent to entertain suits against public authorities in respect of motor accidents, serious invasions of the private rights of citizens, private law contracts, the private domain of the State, defective functioning of the judicial services, customs duties and others. What may prove fatal is the fact that the Joint Court is not a tribunal of inherent judicial powers, but one of *compétence d'attribution*—a competence specifically limited by Article XII of the Protocol. On the other hand, a French judge in the New Hebrides has argued that, since legislation now permits actions against the Crown in England, and French law has always permitted actions against the State, the Protocol should be interpreted to give French and British citizens the same rights against the joint services as they have against their own governments. The difficulty with this argument is that the English

<sup>1</sup> *U.S. Nationals in Morocco case, I.C.J. Reports, 1952, p. 176.*

<sup>2</sup> Restricted circulation.

legislation to which he refers does not apply in the New Hebrides, and this is just as much an objection to the view that the Condominium could be sued in the national courts<sup>1</sup> as it is to the view that it could be sued in the Joint Court, for the conclusion is not easily drawn that the Powers intended to give British subjects rights not inherently available to them.

The question has not arisen whether the Condominium may be sued in foreign courts, if these permit suit against sovereigns in matters *jure gestionis* as distinct from matters *jure imperii*. However, it seems that it should be answered negatively, whether the Condominium is in itself an international legal person, or is regarded as an administrative entity of the Condomini: if it is an international legal person, then it may plead jurisdictional immunity in the same measure as a State may; if it is an administrative instrumentality, it shelters under the immunity of the Condomini. In 1956 the *Cour d'Appel* of Paris considered whether the Belgian Congo might be sued in a French court in respect of a defaulted loan. For the plaintiff it was argued that, since the *loi* of 1908 by which the Congo was administratively organized had designated it a separate legal person from Belgium, and since it was not an international person, it was no more than a corporation which might be sued. The Court held, however, that the Congo fell within Belgium's sovereignty, and shared in the immunity which this sovereignty attracted.<sup>2</sup>

#### 4. Treaty Application to the New Hebrides

There is no inherent reason why the two Condomini should not contract treaties specifically for the New Hebrides, nor why they should not utilize the colonial application clauses of treaties, to which they are both parties, to apply them. There are, however, diplomatic obstacles to this course, which have become aggravated in recent years. In the first place, there has been no occasion to make treaties especially for the New Hebrides, which has no local problems with neighbouring States that might call for treaty solution; and specific application to the New Hebrides of general commitments in the multilateral conventions would only draw international attention to the anomalous situation of the New Hebrides. Furthermore, the utilization of the colonial application clause would perhaps inhibit the withdrawal of either Power from a multilateral convention, and thus impose an impediment to diplomatic freedom of action which no Foreign Office could tolerate. Now that use of the colonial application clause is under attack, this technique of gaining for the New Hebrides the benefits of the

<sup>1</sup> See below, p. 130.

<sup>2</sup> *Congo Belge v. Montefiore*, International Law Reports, 1956, p. 191. The case was referred back by the *Cour de Cassation* in 1962, Dalloz, *Jurisprudence générale* (1963), p. 37.

system of multilateral conventions on which the international economy, technology and political security of the modern world depends may no longer be diplomatically available. Special arrangements have had to be made with respect to diplomatic privileges and immunities of United Nations personnel visiting the Group because the General Convention on Privileges and Immunities does not apply thereto. There is a discriminating factor operating, for the most part unobserved and as yet unimportant, against New Hebridean exports in virtue of the fact that the territory is excluded from the operation of the General Agreement on Tariffs and Trade.<sup>1</sup> The World Health Organization and the Food and Agricultural Organization have a tenuous connection with the Group on a co-operational basis only.<sup>2</sup>

It does not follow, however, that the benefits of all conventions are denied the New Hebrides in practice, for many treaty provisions are imported as part of the national legal systems, or in virtue of local Joint Regulations. None of the international aviation conventions has been territorially applied to the New Hebrides, but in 1948 a Joint Regulation<sup>3</sup> was made which requires any overseas aircraft entering, leaving or operating in the New Hebrides to comply with their 'applicable provisions', as well as with the terms of the licence issued to the operator. All landings are controlled, and permission to land must be obtained from the Resident Commissioners. Aircraft must carry the regulation international documents referred to in the international conventions. The Warsaw Convention on Air Carriage does not apply to flights into or through the Group, though its provisions are imported in some respects into the contracts of carriage

<sup>1</sup> The New Hebrides enjoys preferential treatment in France: hitherto this has given it a competitive advantage in respect of copra.

<sup>2</sup> On 7 February 1952 the United Kingdom signed a Basic Agreement with W.H.O. for technical advisory assistance to non-self-governing territories. On 18 November 1964 a Protocol to this Basic Agreement was signed indemnifying W.H.O., and the United Kingdom's signature records the agreement of France to an interpretation of 'Government' in Art. I to mean the Condominium administration; Cmnd. 2608.

The multilateral conventions applied to the New Hebrides are the Postal and Telegraphic Conventions (*Liste des pays de l'union postale universelle*, 1962; the New Hebrides is listed under France, but not under Great Britain), extended on 5 March 1911 and 8 September 1921 respectively by both Great Britain and France; the Convention on Narcotic Drugs acceded to on the 15 June 1950 (*British and Foreign State Papers*, vol. 156, p. 825); and the Convention on the International Control of Drugs extended to the New Hebrides on 27 February 1950 (*ibid.*, p. 832). The World Meteorological Convention was applied on 1 September 1953 and the formula then employed was: 'France and United Kingdom of Great Britain and Northern Ireland for Condominium of the New Hebrides' (*United Nations Treaty Series*, vol. 209, p. 336). When recently Great Britain inadvertently applied to the New Hebrides an Agreement for the Abolition of Visas made with Turkey, it had to make an embarrassing retraction, on the ground that it was incompetent so to act (*United Kingdom Treaty Series*, 78 (1963), Cmnd. 2172). The International Regulations for Preventing Collisions at Sea have been applied to British shipping in the New Hebrides by Queen's Regulation No. 1 of 1966.

<sup>3</sup> No. 12 of 1948. Both the British and French aeronautical authorities must consent to a grant of traffic rights: exchange of notes of 20 April 1951, *British and Foreign State Papers*, vol. 158, p. 235; The New Hebrides Order in Council, 1961, s.1, 1961, No. 1831.



made by the international carriers, *Union de Transports Aériens* and Fiji Airways.

The International Labour Conventions to which France is a party are imported into contracts of employment between French citizens and optants in the New Hebrides and the indigenous labourers, because the French Labour Code constitutes part of the French national legal system in the Group.<sup>1</sup> Admittedly, its provisions are not strictly enforced by the French administration, but since labour is in a strong economic position in the New Hebrides the situation tends to regularize itself; and British employers, who are not governed by any labour law, and hence not by the International Labour Conventions, are under a practical compulsion to conform to the standards of their French competitors. All treaties, except those excluded upon interpretation, which apply in New Caledonia, apply in the French legal system in the New Hebrides, so that, at least so far as France is concerned, the criticism that can be made of the omission of the New Hebrides from the modern treaty system is minimized. British treaties, however, are rarely transformed into English law, and where they have been enacted they do not apply automatically to the New Hebrides.

### 5. The Placing of the Condominium at War

The problem has never arisen of one of two ruling Powers declaring war while the other remains neutral (of course, if they declared war with each other this would terminate the Condominium). Presumably it would not be possible for the one belligerent party to place the territory in a state of war; and presumably, in consequence, when both parties go to war as allies, a special inclusion of the Condominium in the declaration should be made. This was not done in the case of the New Hebrides in 1914 and 1939. It was merely presumed by everyone that the Group was affected by the declarations of war by Great Britain and France. On 8 May 1940 Viscount Halifax signed an Agreement with the French Ambassador, in which an addition was made to Article VII of the Protocol in order to enable the High Commissioners to declare a state of emergency, and to issue Joint Defence Regulations.<sup>2</sup> This was not, in fact, ratified until 1961. The collapse of France raised a problem. French officials were divided in adherence between General de Gaulle and Vichy, but the French Resident Commissioner, M. Sautat, never wavered in his attachment to the former, and his rivals were deported to Indo-China. Subsequent Joint Regulations, though emanating from both administrations, assumed an exclusively British complexion because in the emergency situation they were drafted by the Australian Government's legal representative in the Group. In

<sup>1</sup> See below, p. 120.

<sup>2</sup> *Foreign Office, Colonial Office file*, M.P. 378 (S)/39.

1940 a Joint Regulation made the Condominium Treasurer a Custodian of Enemy Property.<sup>1</sup> Six days after the outbreak of war with Japan the Resident Commissioners provided for the administration by the Condominium Treasurer of the property of enemy aliens as defined by this Joint Regulation.<sup>2</sup> In October 1941 a Joint Regulation was issued concerning Trading with the Enemy. This defined war as any war in which His Britannic Majesty and His Allies might be engaged, and an enemy subject as any individual or incorporated body of the nationality of a State at war with His Britannic Majesty and His Allies. For the purpose of regulating trade with the enemy, the expression 'enemy' was defined as in the United Kingdom Trading with the Enemy Act and used the test of 'across the line of war'.<sup>3</sup> Japanese assets in the Group were placed under the control of the Condominium by Joint Regulation.<sup>4</sup> In 1954 they were sequestered altogether.<sup>5</sup>

During the war legislation<sup>6</sup> controlled the sale, transfer or charging of any securities of marketable value outside the New Hebrides, and provided for the Resident Commissioners to issue orders vesting these in themselves, free of mortgage, if they should be of opinion that this action would strengthen the financial position of the New Hebrides. Sale, loan and export of foreign currency required the permission of the Resident Commissioners. The economy of the New Hebrides has not yet permitted the total dismantling of exchange control.

#### THE BASIC CONSTITUTION OF THE CONDOMINIUM

It is clear that the delegates who attended the London conference of June 1914 which resulted in the signature of the Protocol began their work on the assumption that they would only effect amendments to the Convention, and that the latter would remain the principal instrument. Sir Edward Grey's instructions to the British delegation were that 'certain new provisions' were 'urgently required in the interests of the native inhabitants and of the European Settlers in the Group'.<sup>7</sup> He referred to a 'draft of amendments to the Convention', which the French Government would be urged to accept. If it were not accepted, the French Government were to be informed that the British Government would propose sending a Joint Commission of Inquiry to the New Hebrides, charged with the duty of ascertaining the truth of matters in dispute between the natives and the settlers, and between the two administrations.

The British Government was represented at the Conference by the Under Secretary of State for the Colonies, by a Foreign Office official and

<sup>1</sup> No. 16 of 1940.

<sup>2</sup> No. 29 of 1941.

<sup>3</sup> No. 19 of 1941.

<sup>4</sup> No. 29 of 1941.

<sup>5</sup> No. 12 of 1954.

<sup>6</sup> No. 17 of 1941.

<sup>7</sup> *Commonwealth of Australia, Parliamentary Papers, General Session (1923)*, vol. ii, No. 24-F. 8292, p. 1125.

two Colonial Office officials, and the Assistant to the High Commissioner for the Western Pacific. The French Government was represented by the Inspector-General of the Colonies, an officer of the *Ministère des Affaires Étrangères* and two officers of the *Ministère des Colonies*. The President of the Joint Court, the Count of Buena Esperanza, attended as expert adviser. His presence does not seem to have compensated for the absence of a legal draftsman, and the document that was finally produced was a patchwork of ambiguous compromises formulated by amateurs. From the outset it is clear that the French delegation had the initiative—an initiative which France has never lost. Not one of the major British amendments was accepted in the form suggested and the text finally agreed upon bears little relationship to the British proposals. In a report on the Conference to the Australian Government, the Colonial Secretary admitted<sup>1</sup> that the scope of the discussion could not be limited to the actual proposals formulated before the meeting of the Conference, and the proceedings had taken the form of a general review of the Convention of 1906. He concluded that 'it will be seen that these new provisions have been very extensively modified in the new draft Convention'. Evidently the British delegation lost control of the process of redrafting the Convention of 1906 and, instead of an instrument embodying amendments, the Conference produced a complete restatement of the Convention. In the dispatch to Australia the Colonial Office referred to this as a 'Convention', but when finally signed it was called a 'Protocol', which is usually a document modifying or explaining a treaty, and is not a substitute instrument, so that even the name given the text is infelicitous. To compound the confusion, various Articles refer, not to 'this Protocol', but to 'this Convention'.<sup>2</sup>

### 1. The Governing Principles of the Condominium

Article 1 of the Convention of 1906 provided that the Group of the New Hebrides, including the Banks and Torres Islands, would form a region of 'joint influence', in which the subjects of the two Powers would enjoy equal rights of residence, personal protection and trade, and each of the two Powers would retain jurisdiction over its own subjects, and neither would exercise a separate control over the Group. The Protocol of 1914 modified this by changing 'retaining *jurisdiction* over its subjects' to 'retaining *sovereignty* over its nationals and over corporations legally constituted according to its law'.

<sup>1</sup> *Commonwealth of Australia, Parliamentary Papers, General Session* (1923), vol. ii, No. 241-F, 8292, p. 1170.

<sup>2</sup> The term 'present Convention' is used in Arts. II (3) (A), III (1), VI (3), VII, VIII (7) (A), (9), (13), (14), XII (3), XIII (2), (3), XIX (1), XXI (6) LXVIII (1); 'the Convention' in Arts. XXI (9), XXVII (2) (H), XXXII (9), LIV (2), LVI (3). In the Preamble to the Protocol is a reference to the Convention of 1906. Apart from Art. LXVIII there is no reference in the text to 'the Protocol'.



The philosophy underlying the Condominium was delineated in the General Instructions to the British and French High Commissioners, the text of which was agreed on by the two Governments on 29 August 1907.<sup>1</sup> They each state in similar but not identical terms that—

... the preamble of the Convention of the 20th October, 1906, indicates the desire of the two Governments to secure the exercise of their paramount rights (*droits de souveraineté*) in the New Hebrides. The two Powers, who were mutually bound not to intervene separately in the New Hebrides, now agree to intervene there together. Instead of remaining mutually exclusive, their paramount rights are combined; the two countries jointly assume jurisdiction (*souveraineté*) in the islands, and thereby provide against the possible appearance of a third Power. The Anglo-French Condominium, which had always existed in a latent form, will become a reality.

It was found very difficult to determine the manner in which this principle should be applied. Diplomatic history furnished no exact precedent. Hitherto experience of a Condominium has been limited to countries already possessing institutions of their own; in those cases it took the form of a Joint Protectorate. In the New Hebrides, on the contrary, the natives live in tribes which hold aloof from one another, and they have no political organization which could be utilised.

The two Powers have not thought it desirable at present to create the separate authority, neither British nor French, which is absent in the New Hebrides. They have preferred to recognize and re-inforce the pre-existing British and French organizations, to preserve their distinct character while extending their scope, and to determine only to what extent and on what principles they should unite for some special cases. On the same territory there will coexist, as it were, two aggregations of settlers—one British, the other French—each governed by its own law and independent of the other. The Convention establishes a system under which they may exist in harmony side by side.

The essence of the arrangement, as this text discloses, is the equality of government by the two Powers, and the coexistence of their respective jurisdictions. The High Commissioners are instructed to act in such a way that neither the principle of equality nor the spirit of coexistence is disturbed.

To some extent the distribution of powers and functions according to the principles of joint and several jurisdictions resembles that in a federal system. Some functions are committed to the High Commissioners jointly, and these become Condominium functions; the balance of functions remains in the domain of the two national jurisdictions. The Condominium may invade the national domain only to the extent to which the powers of the High Commissioners to issue Joint Regulations are validly exercised. The general principle governing the concept of the Condominium was that laid down in Article I (3) of the Convention of 1906 which provided that in all matters not governed by the Convention (that is, in all matters not falling within the jurisdiction of the Condominium),

... the subjects and citizens of the two Signatory Powers and the subjects and citizens of other Powers shall, within the New Hebrides, remain subject to the fullest extent to the laws of their respective countries.

<sup>1</sup> *British and Foreign State Papers*, vol. 100, p. 519.

This provision was omitted from the Protocol of 1914, but is implied in the provision in the Protocol by which each Power retains 'sovereignty' over its nationals.<sup>1</sup> In none of the *travaux préparatoires* of the 1914 Conference, or the dispatches reporting on it, is any indication given why the explicit formula in the 1906 Convention was replaced by one that can only be described as evasive. There may well be an innocent explanation, for both Governments have proceeded on the assumption that the national jurisdictions as defined in 1906 were unaffected by the 1914 formulation. In the Instructions to the High Commissioners of 29 August 1907, which were not replaced in 1914, their views are stated as follows:

British subjects and French citizens take with them to the New Hebrides, with their nationality, the qualities, duties, and rights attached to that nationality. But henceforth the two nations, who formerly exercised only a personal jurisdiction over their own nationals, assume a quasi-territorial jurisdiction. For the British resident that jurisdiction will be British, for the French it will be French.<sup>2</sup>

The French text reads:

Les citoyens Français et les sujets Anglais emportent aux Nouvelles-Hébrides, avec leur nationalité, les qualités, devoirs, et droits attachés à cette nationalité. Mais la loi nationale, qui les régissait jusqu'à présent à titre personnel, les régit dorénavant à titre territorial; pour les Français, l'archipel est territoire Français, pour les Anglais, territoire Anglais.<sup>3</sup>

It is evident that these texts, although mutually agreed upon by the two Governments, do not coincide. The British avoids the notion that the territory is, for British citizens, British territory, and refers to 'jurisdiction'; the French wholeheartedly accepts the proposition that the territory is, for French citizens, French territory. A host of contradictory conclusions flows from this fundamental point of departure. The system contrived in the New Hebrides is described in the English text as 'quasi-territorial', with the implication that the jurisdiction of the two Powers is not in all respects plenary; and the conclusion is that the Group is part neither of the British nor the French national domain, and the national jurisdiction is a consequence of the personal jurisdiction that is exercisable in international law over all nationals who do not fall within another State's territorial jurisdiction. But in the French text the jurisdiction is 'à titre territorial'; this means that the territory is, for French citizens, and for aliens who opt for the French system, French territory, and France exercises over it the same competence in relation to them as it exercises over them in France.

The system applied to the subjects of Powers other than France and Great Britain should in theory derive from the principles of co-ordinated personal and territorial jurisdiction, but the ambiguity in the French and

<sup>1</sup> Art. I (1).

<sup>2</sup> *British and Foreign State Papers*, vol. 100, p. 520.

<sup>3</sup> *Ibid.*, p. 504.

English texts does not put the question beyond doubt. Such subjects, on arrival in the New Hebrides, must opt within one month for either the British or French legal system, or in effect consider themselves as living under either British or French jurisdiction, and they must do this either verbally or by written letter to the relevant Resident Commissioner. Such option is compulsory even before the expiry of one month if the person concerned has committed any action involving the application of the law of either Power or Condominium Joint Regulations. Persons who do not make their choice within one month are placed under one or other of the two systems by joint decision of the High (Resident) Commissioners. The latter are instructed that, in order to avoid all friction with aliens which could create diplomatic issues, the position should be made known with the utmost clarity to residents who are neither British nor French. In this way the number of cases where a decision would be required would be minimized. Also, to avoid disagreement between the Commissioners in determining to which of the two systems an individual should be allotted, the governing consideration should be whether the individual's neighbours are British or French. All considerations of national rivalry, the Commissioners are instructed, should be avoided. The choice of law once made is final.

These provisions do not mean that such persons are assimilated in all respects with British subjects or French citizens, for total assimilation might be offensive to the international law rules by which personal and territorial jurisdictions are integrated. The intention is to treat a Swede, should he opt for the French system, as he would be treated in the law of New Caledonia, and should he opt for the British system, as he would be treated in a British Protectorate.

## 2. Condominium Jurisdiction

The matters placed under joint services, and which thus become Condominium and not national matters, are: (i) posts and telegraphs; (ii) public works, including in particular the construction and maintenance of roads and bridges; (iii) ports and harbours; (iv) buoys and lights; (v) public health; (vi) the Joint Court, the Courts of First Instance and Native Courts; (vii) joint native prisons; (viii) finance (i.e. financial administration); (ix) the Land Registry; (x) the service of the administrative districts; (xi) the department of survey; (xii) the Official Gazette; (xiii) the police force when the two corps of police are acting jointly; (xiv) all other services which the High Commissioners or Resident Commissioners shall by joint decision add to the list of joint services.<sup>1</sup>

This enumerated list of subject-matters differs from that in a classical federation in two respects: first, the functions are primarily executive in

<sup>1</sup> Art. IV.



character, and the power to legislate is essentially ancillary; whereas in a federation the enumerated central powers are primarily legislative and designed to achieve uniformity in law throughout the State. Secondly, the catalogue of Condominium matters may be extended indefinitely merely on the joint decision of the Commissioners.<sup>1</sup> The central authority may thus arrogate to itself additional powers at any time. Furthermore, the powers of the High (actually the Resident) Commissioners acting jointly to legislate for the Group are not limited by the catalogue of Condominium matters. The Commissioners are empowered by the Protocol to issue jointly

. . . for the maintenance of order and for the good government of the Group, and for carrying the present Convention into effect, local regulations binding on all the inhabitants of the Group without exception.<sup>2</sup>

The cataloguing of Condominium matters was explained in the Instructions to the High Commissioners as arising from 'a desire for simplification'. Complete discretion was conferred on the High Commissioners with respect to the arrangement of the Condominium administration, and it was envisaged that, should joint organization of the Condominium services prove difficult, they might be divided into separate administrations, as in the case of the Condominium over the Sudan, with some departments run by one Commissioner and others by the other Commissioner. The Condominium service of public works was stated in the Instructions to be only for works of joint utility. Each High Commissioner was stated to be free to organize separately the national services that he might consider necessary.

### 3. The Extent of Condominium Power

The draftsmen of the Protocol clearly did not advert to the question whether the Condominium should be invested with complete competence to legislate for natives and non-natives. As a result, the basic instrument is inherently ambiguous about the scope of the authority of the High Commissioners, and worse, is inconsistent in the French and English texts. The source of the legislative power over the natives is Article VIII (3). In the English text this reads:

The High Commissioners and Resident Commissioners shall have authority over the native chiefs. They shall have power to make administrative and police regulations *binding on the tribes*, and to provide for their enforcement.

The French text is as follows:

Les Hauts Commissaires et les Commissaires-Résidents auront autorité sur les Chefs des tribus indigènes. Ils auront, *en ce qui concerne ces tribus*, le pouvoir d'édicter des règlements d'administration et de police et d'en assurer l'exécution.

<sup>1</sup> e.g. meteorological functions have been added by Joint Regulation.

<sup>2</sup> Art. VII.

It is obvious that the italicized expressions do not correspond, and there is reason to doubt whether the French text justifies the assumption of power by the Resident Commissioners to issue Joint Regulations which, far from dealing incidentally with tribal organization, seek to legislate for individual behaviour. Most of the Joint Regulations affecting natives (other than the Native Code, the preamble to which refers to Article VIII (4) of the Protocol) purport to be based on this provision, even when, as in the case of the creation of Local Councils, and the grant to them of taxing powers, they aim at undermining, not regulating, tribal organization and the powers of the chiefs.

The legislative power of the High Commissioners over non-natives, and possibly over natives also if Article VIII is not exclusive, derives from Article VII, which, as amended in 1959, is as follows:

The High Commissioners shall have power to issue jointly, for the *maintenance of order and the good government* of the Group, and for carrying the present Convention into effect, *local* regulations, binding on all the inhabitants of the Group without exception, and to enforce such regulations by imposing one or more of the following penalties in respect of each offence [there follow enumerated penalties].

The French text reads:

Les Hauts-Commissaires auront le pouvoir d'édicter conjointement pour le *maintien de l'ordre et la bonne administration* ainsi que pour l'exécution de la présente convention des règlements *locaux* applicables à tous les habitants de l'archipel sans aucune exception et de sanctionner ces règlements par l'une ou plusieurs des sanctions pénales.<sup>1</sup>

The italicized portions of the English and French texts govern the scope of legislative power in the Condominium. Is the grant of power to be construed as plenary, or is it inherently limited? And if it is inherently limited, may the Joint Court strike down legislation which is *ultra vires*? Although the Protocol is a treaty, it is, in the eyes of English law, a legislative enactment analogous to that creating any British colonial constitution. The formula employed in the grant of legislative power to colonies with responsible government is an authorization to legislate for the 'peace, order and good government' of the territory. This has been interpreted many times by the Privy Council and by colonial courts as a grant of plenary power limited only territorially.<sup>2</sup> The expression in the Protocol is so nearly identical with this classical formula as to suggest that a grant of plenary power to legislate was intended in the case of the New Hebrides. Further reflection, however, raises doubts of the validity of the analogy. For one thing, the limitation with respect to penalties embodied in the 1959 amendment to Article VII is incompatible with the notion that the Resident Commissioners may

<sup>1</sup> Cmnd. 668; *United Kingdom Treaty Series* (1959), No. 18.

<sup>2</sup> e.g. *Ashbury v. Ellis*, [1893] A.C. 339; *Macleod v. Attorney-General*, [1891] A.C. 455.

legislate for any event or person, and to any extent. Furthermore, there are many detailed matters in the Protocol which would be redundant if the High Commissioners had been endowed with plenary powers. Among these are Article IX, which deals with the registration of natives, Article XXVI (10) which deals with the registration of land and the imposition of certain penalties, and Article LXI which refers to the establishment of municipalities. The maxim *expressio unius est exclusio alterius* would seem to govern the construction of these Articles.

In French law there is no doubt of the limited nature of the grant of power. Indeed, the French text, with its reference to 'bonne administration' as distinct from 'bon gouvernement' is in all probability more limiting than the English text. Joint Regulations would, on a literal interpretation of the French text, be valid only when enacted for administrative purposes, and would be invalid when they went beyond technicalities and sought to deal with the fundamentals of the social and economic structure. The conclusion is irresistible, then, that in both English and French law the powers of the High Commissioners are restricted, though the extent of the restriction may depend on whether the English or the French text is to prevail. At this point in the analysis it is necessary to recall that the Protocol, although a piece of domestic legislation for purposes of grants of power, is ultimately a treaty to be interpreted according to the so-called canons of treaty interpretation.<sup>1</sup>

In 1959 the French National Court in the New Hebrides consulted the French Ministry of Foreign Affairs on the extent to which Joint Regulations might affect French citizens or British subjects. In a dispatch of 25 May 1959<sup>2</sup> addressed from the Ministry of Foreign Affairs to the *Ministre-délégué* of the Prime Minister, it was advised that the French national laws (or English national laws) normally applicable to French or British subjects might be modified by Joint Regulations of the Resident Commissioners, within the limits laid down in the Protocol. These limits are those implied in the grant of power to legislate for the 'bonne administration' of the Group, and as the Ministry opinion concedes, these can only be appreciated in the context of the circumstances and local necessities.<sup>3</sup> The question had been raised whether a Joint Regulation could modify the Labour Code applying to the French citizens in the New Hebrides. The opinion, then, contemplates the possibility of the invalidity of Joint Regulations which are not made for the 'bonne administration' of the Group.

<sup>1</sup> Art. XXVII of the Vienna Convention, 1969, states that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. The Protocol's object and purpose could be considered in delimiting constitutional powers.

<sup>2</sup> No. 107.

<sup>3</sup> *Dès lorsqu'ils agissent dans les limites prévues à l'article 7 du Protocole, limites qui ne peuvent être appréciées que compte tenu des circonstances et nécessités locales.*



#### 4. The Power of the Joint Court to Strike Down *Ultra Vires* Joint Regulations

If there is an inherent limitation in the powers of the High Commissioners to issue Joint Regulations, is there also an inherent power in the Joint Court to strike down Joint Regulations which are *ultra vires*? To the English lawyer the Protocol is a piece of subordinate legislation, authorizing the issue of sub-delegated legislation; and the exercise of sub-delegated powers in his conception will always be strictly controlled by the *vires* doctrine. To the French lawyer, it is inconceivable that no judicial remedy exists with respect to the abuse of power, and since there is no administrative court in the New Hebrides, the functions of such a court, in his conception, must be inherent in the Joint Court. But even if one regarded the Joint Court as administering a jurisdiction neither English nor French, the fact that the Protocol is silent on the point of the Joint Court's power to pronounce on the validity of Joint Regulations would not negate the existence of such power. The United States Constitution is also silent on the power of the Supreme Court to invalidate Acts of Congress, yet to Marshall C.J. it was self-evident that if a written Constitution restricts legislative power there must be an inherent jurisdiction in the Court to declare that a purported exercise of power is valid or not.<sup>1</sup> In short, the Joint Court of the Condominium must be invested with competence to decide whether an instrument is a Joint Regulation or not.<sup>2</sup>

### THE ADMINISTRATION OF THE CONDOMINIUM

#### 1. The Administrative Structure

The Convention of 1906 (repeated in the Protocol of 1914) provided for the signatory Powers each to be represented in the Group by a High Commissioner, assisted by a Resident Commissioner to whom the High Commissioner should ('shall') delegate his authority, and who would represent him in the Group during his absence.<sup>3</sup> In fact the High Commissioners are respectively the British High Commissioner in the Western Pacific, with administrative headquarters in Honiara in the Solomon Islands, and the French Governor in New Caledonia, with administrative headquarters in Noumea. The Resident Commissioners in Port Vila are the effective administrators of the New Hebrides, though they are answerable to the High Commissioners. Departmental officers in the British jurisdiction are treated as seconded for pension and other purposes from the Solomon Islands Protectorate, while French officers are members of the French

<sup>1</sup> *Marbury v. Madison*, 1 Cranch 137 (1803), at 177.

<sup>2</sup> In fact the Joint Court has avoided striking down Joint Regulations for reasons of *ultra vires* so as not to bring government to a halt.

<sup>3</sup> Art. II.

civil service, and fall in some instances under the administrative supervision of the departmental heads in Noumea (for example, French judicial officers in the New Hebrides are under the jurisdiction of the Procureur-Général of New Caledonia). The British administration is concerned with jurisdiction over British interests, and the French administration with jurisdiction over French interests. Condominium matters are the prerogative of a separate Condominium administration which is, save for secondment in the case of the District Agents and others, legally unconnected with either of the national administrations. Condominium officers are appointed by and answerable to the Resident Commissioners, and have no connection with either the British or French services. Their salaries and pensions, as well as their leave arrangements, are matters for the Resident Commissioners to determine, and for appropriation in the Condominium budget. Not surprisingly, Condominium officers fare badly in comparison with their British and French colleagues.

The coexistence of these three administrative structures, each with its own traditions and its special privileges and disabilities does not make for harmony. British officials are employees of the Western Pacific administration, not of the United Kingdom. French officials are part of the French civil service, they preserve their place in the *cadre* system, and while they are posted to the Condominium they enjoy privileges and advantages that to the British administration appear excessive.<sup>1</sup> The mild resentment that British officers feel over the status of their French colleagues is complemented by that felt towards both the British and French services by their poor relations in the Condominium service, whose struggle for better status and salary and conditions of service is continuous and not altogether successful. The Condominium service is also hobbled by the need to preserve equilibrium between the French and British in appointments to vacant posts. The policy is to have a deputy of different nationality from the head of department. The Treasurer is always British and his *Adjoint au chef* always French; the Auditor (*Ordonnateur*) is always French and his assistant always British; the Postmaster is actually British, as are the heads of the radio and meteorological services, while the heads of the departments of mines, surveys, agriculture and public works are actually French. A well-qualified officer in any department may find himself disabled from promotion to the top grades because he is of the wrong nationality.

Although the British and French administrations are supposed to be

<sup>1</sup> To compound the disequilibrium between the French and British services, the British officer must pay taxation at the Solomon Islands rate and rental on his house, and also provide his own car, whereas the French officer pays no taxation, has a free house, and is often provided with a car. To add to the sense of grievance, the British officer is acutely aware that the tax he pays is attributed to the expenses of the British administration of the Condominium, of which salaries constitute a major item. In effect, he is helping to pay the salary on which he is taxed, whereas the French official is entirely supported by the French taxpayer.

concerned only with things, persons and events falling under their respective national jurisdictions, they have, in fact, extended their influence over the natives by indirect control, and in competition with each other. French national and mission schools are administered by the French educational services, and aim to transform the native pupils who attend them through an intensive experience in *la civilisation française*: the French administration devotes a great deal of its time to this end. The British administration eschews direct proselytization, but in the interests of discharging a colonial responsibility is intensifying its control over the Presbyterian and Anglican mission schools, and, whether intentionally or not, is exercising an influence which, if not pro-British, is hardly sympathetic to the French. This extension of national jurisdiction over persons not intended to be subject to them is achieved in virtue of jurisdiction over the individuals and corporate bodies who are concerned with native welfare.

## 2. The Delegation of Powers to the Resident Commissioners

The provision in the Protocol authorizing the High Commissioners to delegate their powers to the Resident Commissioners<sup>1</sup> is not the least of its curiosities. Whether the draftsmen intended that the High Commissioners would retain a power of veto over the acts of their Resident Commissioners is not at all clear, and they may well not have thought of it. If they did intend that there should be such a veto why did they make it mandatory for the powers of the High Commissioners to be delegated? How, if powers are delegated, is it possible to veto them after they have been exercised? It does not seem to have occurred to the draftsmen that the scheme they devised is not one of subordinate legislation, but is rather analogous to agency. An agent endowed with authority is competent to commit his principal and may not be repudiated after the event. But why, if the Resident Commissioners under the scheme would be fully competent, were the powers invested initially in the High Commissioners? Obviously so long as the High Commissioners carry the ultimate responsibility they will be reluctant to divest themselves altogether of control over the acts of their subordinates, and until 1964 the British and French Governments sought in different ways to reconcile the need for preserving the competence of the High Commissioners with the requirement that their powers be delegated, but the Joint Court in that year held that the common effect of these different approaches was to invalidate the delegation altogether.<sup>2</sup> Following

<sup>1</sup> Art. II (3). The Article says 'shall' delegate, but the subsequent words 'so far as he considers it expedient' might nullify the mandatory effects of this.

<sup>2</sup> The Joint Court held that the previous delegations, both British and French, were defective, in that the French High Commissioner had not properly delegated to the French Resident the power to make Joint Regulations because he had reserved the right antecedently to approve of these; the British delegation had never been published and had been made subject to disallowance: *Hagen v. The Public Prosecutor*; *Leeman v. The Public Prosecutor*. Unreported.



the decision new instruments of delegation were drafted.<sup>1</sup> They concede that the delegation must be without qualification, but this raises a new difficulty: May the High Commissioners exercise their legislative functions without revoking the delegations? In French law a delegate is invested with plenary power to the exclusion of the delegator during the period of delegation. If a French interpretation of the delegation of powers of the High Commissioners is to prevail, therefore, it would seem that the latter are divested of all legislative competence, and hence of the competence to overrule, veto or disallow.

Article VII of the Protocol provides for Joint Regulations to be 'binding on all the inhabitants of the Group without exception'. The law must not merely be general, but must be the same for everyone. Exceptions predicated on nationality, caste, rank or office render legislation void. During the Second World War a Joint Regulation prohibited the entry on ships in Port Vila, without authority, of all persons save the Resident Commissioners and the judges of the Joint Court. The Registrar of the High Court in the British Jurisdiction offended against this Joint Regulation and was prosecuted. The Joint Court struck down the Joint Regulation for want of universal application.<sup>2</sup>

Although the form of legislation is prescribed to be Joint Regulation, the Resident Commissioners have not been content with so simple a system, and have reproduced all the complications of rules and orders that have given rise, both in England and in France, to problems of sub-delegation.<sup>3</sup>

<sup>1</sup> *Gazette Extraordinary of the Condominium*, Supplement No. 4 to No. 224, 25 November 1964.

<sup>2</sup> *Dubois v. The Public Prosecutor*. Unreported.

<sup>3</sup> The various Joint instruments were classified by Joint Standing Order No. 2 of 1956 as follows:

1. Regulations (*Rèlements*). These are texts of general and permanent application. General application does not mean indiscriminate application to the whole population of the Group, but includes general application to certain categories of the population.

2. Rules (*Arrêts*). These are texts having general application which are issued by authority of a Regulation, and specify in more detail the provisions thereof.

3. Decisions (*Décisions*). These are texts issued either by virtue of a Joint Regulation, or independently of any other text, which have a limited application normally to particular persons.

4. Joint Standing Orders (*Instructions*). These are texts regulating the internal organization and operation of one or more Condominium Departments, or containing provisions concerning Condominium staff and not the general public.

Matters of detail, the Order states, should not be dealt with by Regulation. It is preferable to have a short Regulation authorizing the issuing of Rules. The definition of a Joint Regulation in this classification is defective in that it overlooks the governing principle in the Protocol of national equality.

The various legislative texts are supposed to be drafted according to procedures laid down in the Joint Standing Order of 1956 on the Classification of Joint Texts. They are to be drafted by the Head of a Condominium Department, and the draft must be considered by the Resident Commissioners who will ascertain that its provisions are not contrary to the Protocol or any other text applicable to the subject. A translation into either French or English is then made, and four copies are signed by the Resident Commissioners. All Regulations and Rules are to be published in the *Condominium Gazette*. Decisions are normally published in abbreviated form, while

The making of Rules (*Arrêtés*) under Joint Regulations is, in the eyes of English law, a hazardous procedure because it imports all the limitations of *delegatus non potest delegare*, and attracts in its fullest degree to the exercise of power the controlling doctrine of *ultra vires*. The fact that the Resident Commissioners delegate power to themselves (and thereby sub-delegate the powers of the High Commissioners) does not alter the fact that when they make Rules they make subordinate (indeed sub-subordinate) legislation, for English law looks to the form in which an enactment is made, and not to the office-holder who makes it. In French law the matter is different, and no objection is taken to a legislator enacting in subordinate form when he could have legislated in the primary form; he is still the same person, invested with the same powers. Obviously, then, there is a fundamental cleavage in views between English and French law on the competence of the Resident Commissioners to issue Rules: in the English view they are competent to do so only to the extent to which they are authorized by Joint Regulation; in the French view they are competent to do so to the extent to which they might legislate by Joint Regulation. In fact the making of rules by the Resident Commissioners has occurred with such disregard of the exigencies of English law that the validity of many Rules depends upon whether or not the French view of the matter prevails. Attempts have even been made, as, for example, in the case of mining legislation, to amend a Joint Regulation by a Rule.

On one point, however, the English and French views on delegated legislation coincide, and that is over the requirement that only the persons authorized to issue Rules may sign them. There have been instances when subordinate officers of both administrations have signed Rules in place of the Resident Commissioners who had authorized themselves to make rules. (The French in this respect have been far worse offenders than the British.) One of these Rules was considered by the Joint Court in an appeal from a traffic prosecution, and the Chief Justice of the Western Pacific was moved to criticism of this disregard of even the basic requirements of the making of delegated legislation.<sup>1</sup> The Joint Court has also held that publication of legislation is a pre-condition of its applicability (or *opposabilité aux*

Standing Orders are only published if of general application. The Registrar of the Joint Court is responsible for dispatching all material for publication in the *Gazette* to the High Commissioner's office in Noumea.

Joint Regulations made before 6 August 1914 were promulgated under the provisions of the Convention of 1906, and were continued in force by Joint Regulation No. 2 of 1923. The only such Regulations still in force are two of 1907 concerning import and manufacture of liquor, and ports of entry, one of 1911 concerning arms, and two of 1914 concerning seashore structures and vessels in Vila.

Up to 1968, 663 Joint Regulations had been issued. A draft Regulation for the consolidation of the laws of the New Hebrides was made in 1956, but was never enacted. It is informally referred to as the Macaskie Consolidation.

<sup>1</sup> *Hagen v. The Public Prosecutor*, 1964. Unreported.

*administrés*). Despite this, the administration continued to issue legislation stating on its face that it is to come into force on signature.<sup>1</sup> To add to the complication, the French version of this formula is somewhat longer and less specific than the English.

If the forms of drafting are occasionally unobserved, the lapses over the techniques of drafting are more startling. An act which in the English text of one Joint Regulation is an offence punishable by a specific penalty when first committed is such an offence in the French text only *en cas de récidive*. Some expressions are fatuous, as in the requirement that every vehicle, other than a trailer, shall have a driver.<sup>2</sup> Portions of the native code are legally meaningless. The appointment in June 1964 of a legal adviser to the British administration is an important step in ensuring that legislation will be made in a tidy and intelligible fashion, but it will not of itself ensure that the latent ambiguities deriving from the conscious or unconscious use of the technical language of English law or French law will be resolved.<sup>3</sup>

### 3. District Administration

The Protocol of 1914 provided for the creation of administrative districts by the joint decision of the Resident Commissioners.<sup>4</sup> At the head of each district would be two Agents, one British and one French, who should exercise over their respective dependents, and over the natives, the powers conferred upon them by the regulations and instructions agreed upon by the High Commissioners or Resident Commissioners. The two Agents are required by the Protocol to make periodical tours of inspection together in the district, and to co-operate with each other in collecting from the dependents of both powers all information relating to the general application of the provisions of the Protocol and the Joint Regulations. These tours must be undertaken at least three times a year, and every dependent of the two Powers who employs natives in any capacity must be visited at least once in the course of each year. When an employer is visited, his own national Agent alone may interview him, the other Agent being required to limit himself to listening to the requests for information and the replies

<sup>1</sup> The last occasion was on 22 December 1964, Joint Regulation No. 38 of 1964. Since then the formula 'shall come into operation on the date of its publication in the Condominium *Gazette*' has been used, or, in French, '*prendra effet (or entrera en vigueur) pour comptes de la date de sa publication au Journal Officiel du Condominium*'. The reason for the earlier formula was the delay in publication in the *Gazette* of up to six months (now three months), owing to the fact that it is printed in Noumea, and there is a valid objection to suspending all legislative effect for this period. When urgent legislation is required a special edition is produced in Port Vila.

<sup>2</sup> Joint Regulation No. 4 of 1962.

<sup>3</sup> Until June 1964 legislation was drafted by administrative officers who have demonstrated a surprising competence. But inevitably they have been betrayed by technicalities, stenographic errors and faulty translation.

<sup>4</sup> In accordance with Art. II (3) of the Protocol, four Administrative Districts were created by Joint Decision No. 5 of 1965.



given to them. At the close of every inspection the Agents must embody the results of their inquiries in detailed reports, which they are obliged to communicate to each other before forwarding them to their respective Resident Commissioners.<sup>1</sup>

Some of these rules are obsolescent, and some ignored. Since the provisions respecting tours and visitation of employers were incorporated to deal with the problem of recruited native labour, they lost their relevance when recruitment ceased. Tours are now frequently undertaken, on an average of once a month, to at least part of a District, and are jointly undertaken whenever possible. Occasionally, however, one District Agent finds it inconvenient to travel, and the other travels alone.

Until after the Second World War the District Agents were not colonial officials with proper training, but were local Europeans who more or less drifted into the job. Most of the books written on the New Hebrides are critical of these officers and of the way they performed their duties.<sup>2</sup> The seconding to the Condominium of British and French civil servants as District Agents has greatly raised the standard of District administration.

#### 4. The Police

The Convention of 1906 (repeated in the Protocol of 1914) provides that the High Commissioners or Resident Commissioners shall be provided with a police force of sufficient strength to guarantee effectively the protection of life and property. The force is to be divided into two corps of equal strength, each of which is under the orders of one of the Resident Commissioners. The corps may not be employed otherwise than in conformity with the principles laid down in the Protocol. In the Instructions to the High Commissioners<sup>3</sup> it is stated that, in order to avoid undesirable rivalries and friction, the two corps should be recruited as far as possible among men of the same race, should be always in close touch with one another, and should have their quarters together. In 1923 a New Hebridean Constabulary was created consisting of two divisions of equal strength, each appointed by the High Commissioner.<sup>4</sup> In fact, each corps generally acts separately and deals only with the dependents of its national jurisdiction. If a member of the corps under the orders of the French Resident observes an infraction of the British national law the most he can do is report the matter to the British police. In native matters the two corps may act together, when the force falls under the joint direction of the Resident Commissioners.

<sup>1</sup> In at least one District the British Agent has never seen a Report of his French colleague.

<sup>2</sup> e.g. Mander, *op. cit.* (above, p. 77, n. 2).

<sup>3</sup> *British and Foreign State Papers*, vol. 100, p. 521.

<sup>4</sup> Joint Regulation No. 4 of 1923.

The direction of the Constabulary has been a bone of contention ever since the Condominium was created. The inability of the British and French police to co-operate under the Convention of 1906 was a principal reason for the calling together of the Conference of 1914 which produced the Protocol. The British Government then urged the unification of the force under a neutral commandant, but the French resisted, partly on the ground that the French National Assembly, which would have to approve of any new Convention, would not tolerate the subjection of French citizens to a police authority not regulated by French law.<sup>1</sup> Ever since, the British administration has taken the position that there is one police force, whose members have ordinary police powers over every person in the Group; and ever since the French have insisted on the principle of exclusive jurisdiction. When a Condominium matter is involved, the two forces combine.

### 5. Immigration

Control of entry into the New Hebrides is authorized by a Joint Regulation of 1934.<sup>2</sup> This defines an immigrant as a person not resident in the Archipelago. It specifies the conditions under which persons may enter the Group to reside, provides for deposits to cover the cost of repatriation and grants authority to the police to prohibit landing. The Resident Commissioners must act jointly to deport any person convicted of landing without permission. British and French subjects or protected persons must be in possession of a passport, and aliens of a passport endorsed as valid for the New Hebrides and bearing a visa issued by a British or French consular officer.<sup>3</sup> Any person arriving in the Group without a passport is presumed to be an alien until he proves the contrary. However, the immigration officer is endowed with a wide discretion, both to exclude British and French citizens with passports, and to give leave to aliens without either passports or visas, on authorization from the Resident Commissioners. Breach of the conditions of landing constitutes an offence for which deportation on conviction may be ordered.<sup>4</sup> Masters of ships are subject to special restrictions on permitting passengers or crew to land without authority.

A Joint Regulation<sup>5</sup> provides for the appointment of a Principal Immigration Officer with powers to search ships in the New Hebrides and to require any person suspected of being a prohibited immigrant to produce documents and give information. He might also require any person enter-

<sup>1</sup> *Commonwealth of Australia, Parliamentary Papers, General Session, 1923, vol. ii, No. 241-F, 8292, p. 1125.*

<sup>2</sup> No. 8 of 1934.

<sup>3</sup> No. 1 of 1950, s. 2.  
<sup>4</sup> The Resident Commissioners do not need to concur in a recommendation for deportation; Joint Regulation No. 1 of 1956.

<sup>5</sup> *Ibid.*

ing the Group to be medically examined. A prohibited immigrant is defined as any person who is not the holder of a valid entry permit, or is subject to a deportation order, or is notified to the Principal Immigration Officer by the Commandant of the British Police as a person whose entry is likely to be prejudicial to the administration, or who is convicted,<sup>1</sup> or has opted for the British system but has not been granted a valid entry permit. A prohibited immigrant may be arrested.

No person may enter the New Hebrides without a permit. Provision is made for deportation of indigents, bad behaviors or persons who stay more than four months, and for deportees to be detained.

### THE NATIONAL JURISDICTIONS

The retention by each of the two Powers, Great Britain and France, in Article I of the Protocol, of 'sovereignty' over their respective nationals is the source of the separate jurisdictions in the Group.

#### 1. The British Jurisdiction

In English law a treaty does not impose duties on British subjects (or anyone else), or confer rights upon them; and legislation to this end is required. The present legislation which confers authority on the British administration over British subjects is the New Hebrides Order in Council, 1922,<sup>2</sup> by which the Protocol was given internal legal effect in English law: and a complex of statutes and Orders in Council. A history of the evolution of the British legislative jurisdiction in the Western Pacific is necessary for an appreciation of the competence of the British administration in the New Hebrides.

The situation in the Pacific Ocean towards the end of the nineteenth century led to two enactments of the United Kingdom Parliament, known as the Pacific Islanders Protection Acts, 1872,<sup>3</sup> and 1875,<sup>4</sup> by which provision was made for the prevention and punishment of criminal outrages upon natives of islands, not being in Her Majesty's dominions, nor within the jurisdiction of any civilized Power. Section 6 reads:

It shall be lawful for Her Majesty to exercise power and jurisdiction over her subjects within any islands and places in the Pacific Ocean not being within Her Majesty's dominions, nor within the jurisdiction of any civilized power, in the same and as ample a manner as if such power or jurisdiction had been acquired by the cession or conquest of territory, and by Order in Council to create and constitute the office of High Commissioner in, over, and for such islands and places, or some of them,

<sup>1</sup> Queen's Regulation No. 2 of 1962 amended the provision relating to immigration of convicted persons.

<sup>2</sup> S.R. & O. No. 717 of 1922.

<sup>3</sup> 35 & 36 Vict., c. 19.

<sup>4</sup> 38 & 39 Vict., c. 51.



and by the same or any other Order in Council to confer upon such High Commissioner power and authority, in Her name and on Her behalf, to make regulations for the government of Her subjects in such islands and places, and to impose penalties, forfeitures, or imprisonments for the breach of such regulations.

The Foreign Jurisdiction Act, 1890,<sup>1</sup> to some extent superseded these two enactments, but the effects of Section 6 just mentioned were saved by Section 1, which reads:

It is and shall be lawful for Her Majesty the Queen to hold, exercise and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.

Since the New Hebrides fell within the scope of Section 6, and the Orders made under it, it was assimilated for jurisdictional purposes to a 'ceded or conquered territory'. In view of the fact that the Condominium, even if it constitutes a separate legal person, is in essence a joint exercise of the Crown's power, there can be little doubt that the Group remained after 1906, and remained until 1962, so assimilated.

Effect in English law was given to the Convention of 1906 by Order in Council of 2 November 1907<sup>2</sup> which incorporated the Pacific Order, 1893,<sup>3</sup> in its application to the New Hebrides. This provided that the Convention would 'have the force of law' and 'be binding upon all persons' within the Group subject to the Crown's jurisdiction. Provision was made for the appointment of a High Commissioner for the New Hebrides under the Royal Sign Manual and Signet, and that pending this appointment the office should be held by the High Commissioner for the Western Pacific. The two offices have remained fused ever since. The High Commissioner exercises all the Crown's powers, subject to the limitations in his instructions. The Order gave the High Commissioner power to appoint a Resident Commissioner and subordinate officials, who might exercise such powers as the High Commissioner, with the approval of the Colonial Secretary, might assign to them. However, the appointment of these officers would not abridge, alter or affect the right of the High Commissioner to execute and discharge all his own powers.

The Protocol of 1914 was brought into internal operation in English law by the New Hebrides Order in Council, 1922,<sup>4</sup> which revoked the Order of 1907. The new Order, made pursuant to the Foreign Jurisdiction Act, 1890, provided that the Protocol would 'have the force of law' and 'be binding upon all persons' within the New Hebrides 'over whom His Majesty shall at any time have jurisdiction'. The Order, in detailing the

<sup>1</sup> 53 & 54 Vict., c. 37.

<sup>2</sup> S.R. & O., No. 864 of 1907.

<sup>3</sup> *British and Foreign State Papers*, vol. 85, p. 1053. Incorporated by s. 9.

<sup>4</sup> *Ibid.*, vol. 116, p. 115.

High Commissioner's powers, gained legislative force for his Instructions by requiring him to act subject to them. The effect of this is to permit construction of the Protocol by reference to the Instructions.

(a) *The New Hebrides as foreign territory in English law*

English law distinguishes between British possessions, foreign territory under Her Majesty's jurisdiction and foreign territory under foreign jurisdiction. A British possession is defined by the Interpretation Act, 1889,<sup>1</sup> to be any part of Her Majesty's dominions except the United Kingdom. The expression 'Her Majesty's dominions' means all the territory under the sovereignty of the Crown. The New Hebrides, which are described in the English text of the Instructions to the High Commissioners as being subject to the 'quasi-territorial' jurisdiction of the Condomini, is not part of Her Majesty's dominions, and hence not a British possession. It is, therefore, in the second category of foreign territory under Her Majesty's jurisdiction, and as such is assimilated to protected territory. For most relevant British purposes it is constitutionally in the same position as the British Solomon Islands Protectorate. It follows that legislation predicated upon territory being a British possession does not apply automatically to the New Hebrides.

(b) *The applicability of English law to the New Hebrides*

The Order of 1922 has to be read with the Pacific Order, 1893, and the Western Pacific (Courts) Order, 1961,<sup>2</sup> to afford a complete picture of the British jurisdiction. The Order of 1922 makes British citizens subject to the Condominium, equally with French citizens, and to such legislation as the British High Commissioner or Resident Commissioner, acting alone, might enact for them. The Order of 1893 gave the High Commissioner's Court jurisdiction to decide cases affecting them in conformity with the substance of the law for the time being in force in England. But to what extent did this formula import English law into the New Hebrides to govern the acts of British subjects? This depends upon the status of the New Hebrides as English law conceives it.

English law distinguishes between ceded and conquered colonies on the one hand, and settled colonies on the other. In the case of the former, the Crown has absolute power to legislate by Order in Council until the power is surrendered, either by establishing, or authorizing a governor to establish, a representative assembly. Also, the law existing before the cession or conquest is presumed to continue until altered, and the only English law that extends is that with respect to the Crown's administrative and judicial prerogatives. In the case of a settled colony, the principle is that an English-

<sup>1</sup> 52 & 53 Vict., c. 63, s. 18 (2).

<sup>2</sup> S. I., No. 1506 of 1961. By virtue of Proclamation No. 3 of 1962 made under s. 27 of the Order of 1961 most of the Order of 1893 was revoked.

man carries with him English law and liberties, and any legislature which might be established by the Crown must be a representative one with powers of taxation. The Crown cannot legislate for a settled colony by Order in Council.

It is obvious that far less English law extends to a ceded or conquered colony than to a settled colony, and such law as does extend is public law. The distinction between ceded or conquered and settled colonies is predicated on the supposition that in the former case there is already in existence in the territory a civilized system of law, whereas in the latter there is not; it is therefore a distinction ill fitted for territories, such as the New Hebrides, in which there is a legal vacuum. The question is to what extent this vacuum has been legislatively filled, and the answer to it is extremely doubtful. The Convention of 1906 referred to the two Powers retaining jurisdiction over their citizens, and to the latter remaining subject 'to the fullest extent to the laws of their respective countries'. The Protocol of 1914 refers to the retention of 'sovereignty' over such persons. The Pacific Order in Council, 1893, provided for the exercise of civil and criminal jurisdiction. Not everything that would be an offence in England was made criminal in the Pacific,<sup>1</sup> and the question arose whether the Order extended more law to the territory than would normally be extended to a ceded or conquered colony, or merely preserved the jurisdiction which the Crown already possessed in the Group. In the case of a settled colony not all the law in force in England, by any means, extends to the territory. Only those statutes extend which are of general application, and after the settlement of the colony only those of direct constitutional effect. It would require a very specific enactment to extend to a ceded or conquered colony more legislation than would inherently extend to a settled one.

The status of the New Hebrides in the eyes of English law was altered by the Western Pacific (Courts) Order in Council, 1961,<sup>2</sup> also made under the Foreign Jurisdiction Act, 1890, which assimilated the territory to a settled colony. The Order which defined the jurisdiction of the High Court of the Western Pacific as the British court in the Group, preserved the application to the New Hebrides of the Pacific Order in Council, 1893, but enacted as follows:

- (1) Subject to the provisions of this Order and any rules made thereunder and to any law for the time being in force in any territory, the civil and criminal jurisdiction of the High Court shall, so far as circumstances admit, be exercised upon the principles of and in conformity with
  - (a) the statutes of general application in force in England on 1st day of January, 1961,
  - (b) the substance of the English common law and doctrines of equity (and procedure and practice for each particular court)

<sup>1</sup> s. 20. Revoked by Proclamation No. 3 of 1962.

<sup>2</sup> s. 1. No. 1506 of 1961.



Provided that the said common law, doctrines of equity and statutes of general application shall be in force so far only as the circumstances of any particular territory and its territory and its inhabitants and the limits of Her Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary.

(2) . . . the Evidence Act, 1851 (ss. 7 & 11)

Foreign Tribunals Evidence Act, 1856

Evidence by Commission Act, 1859

British Law Ascertainment Act, 1859

Foreign Law Ascertainment Act, 1861

Evidence by Commission Act, 1885

. . . shall . . . apply.<sup>1</sup>

The importation into the New Hebrides by this Order of the common law and of equity is probably clear; but this is not so with respect to statutory law. An initial difficulty over the applicability of United Kingdom statutes is the relevant date for their importation, namely 1 January 1961. All the settled colonies had already been settled for over a century; the accepted rule is that only the statutory law existing at the date of settlement applies; the matters dealt with by statute a century ago are radically different from those dealt with nowadays. It follows that the only available experience, namely that of the earlier settled colonies, and principally the Australian colonies, is of slight relevance in determining what in 1961 was a statute 'of general application'. Indeed, this very formula may involve a deception, for it adopts one (and possibly by implication excludes any other) test for determining the applicability of statutes, namely, their generality; and there may be a confusion between 'generality' and 'applicability', which are by no means synonymous terms.

The Australian courts have on many occasions been required to determine whether particular statutes applied in the Australian colonies at the date of settlement.<sup>2</sup> In the case of New South Wales, the Constitution of 1828 provided for the application therein of all statutes 'in force within the Realm of England' which could 'be applied' within the Colony. In interpreting this the courts quickly came to the conclusion that an English statute might be generally suitable to overseas possessions, and, indeed, intended to apply to them, but be unsuited to the circumstances and conditions prevailing in the colony at the time of the reception of English law. A test of 'necessity' thus came to substitute for one of 'generality'—a test, indeed, anticipated by Blackstone who, discussing settled colonies, wrote:

The artificial distinctions and refinements, incident to the property of a great and commercial people, the laws of police and revenue (such as are enforced by penalties),

<sup>1</sup> s. 15.

<sup>2</sup> Castles, 'The Reception and Status of English Law in Australia', *Adelaide Law Review*, 2 (1963), p. 13.

the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them and therefore are not in force.<sup>1</sup>

The Australian courts rejected English statutes on the grounds that (a) they aimed to correct evils peculiar to England;<sup>2</sup> (b) they were not suitable to Australian conditions;<sup>3</sup> (c) that local machinery for enforcing the Act was non-existent.<sup>4</sup> On the other hand, they accepted English statutes which were both generally applicable and locally suitable, such as the Statutes of Limitation,<sup>5</sup> statutes creating general offences,<sup>6</sup> dealing with the Crown's right in land<sup>7</sup> and other land matters,<sup>8</sup> the Statutes of Distribution,<sup>9</sup> and laws dealing with master and servant relationships.<sup>10</sup> They have also considered that it is possible to sever unsuitable provisions from statutes of general application, but not to apply suitable provisions of general applicability from statutes which as a whole are not generally applicable.<sup>11</sup>

It is evident that these authorities are of limited relevance in determining whether modern statutes which deal with the substance of social relationships are of general application to the New Hebrides. There would seem to be little doubt that the Sales of Goods Act would apply; but there must be the gravest doubt whether the Companies Act could do so. In 1966 effect was given by Queen's Regulation<sup>12</sup> to the Brussels Convention on Collisions at Sea, which does not apply outside the United Kingdom unless by Order in Council.<sup>13</sup> A few specific instances of legislation whose applicability to the Group is either excluded or dubious may suffice to clarify the point:

(i) *Copyright Act, 1956*. Section 31 of the Copyright Act, 1956,<sup>14</sup> provides for the extension of the Act by Order in Council to any country outside Her Majesty's dominions in which for the time being Her Majesty has jurisdiction. The New Hebrides is such a country. It follows that unless an Order in Council is made extending the Act, it is not in force in the New Hebrides. This is an instance of an Act which is not, in virtue of its specific provisions, one of general application.

<sup>1</sup> Quoted by Castles, loc. cit. (above, p. 111, n. 2), p. 4.

<sup>2</sup> e.g. the Mortmain Acts, *Whicker v. Hume* (1858), 7 H.L.C. 124; Publication Acts, *Jolly v. Smith* (1899), 1 N. & S. 143; 10 Aust. Dig. 497; British Stamp Duty on Newspaper Act, *Winterbottom v. Vardon*, [1921] S.A.S.R. 364.

<sup>3</sup> British Sunday Observance Act, *M'Hugh v. Robertson* (1885), 11 V.L.R. 410.

<sup>4</sup> Lottery Acts, *Quan Yik v. Hinds* (1905), 2 C.L.R. 345.

<sup>5</sup> *Attorney-General for N.S.W. v. Love*, [1898] A.C. 679.

<sup>6</sup> *R. v. Black Peter* (1863), 2 S.C.R. N.S.W. 207; *R. v. Packer* (1864), 3 S.C.R. N.S.W. 40.

<sup>7</sup> *Attorney-General for N.S.W. v. Love*, [1898] A.C. 679.

<sup>8</sup> *Cannon v. Keighran* (1843), 1 Legge 170.

<sup>9</sup> *Skeeles v. Hughes* (1877), 3 V.L.R. (E) 161.

<sup>10</sup> *Bilby v. Hartley* (1892), Q.L.J. 137.

<sup>11</sup> *Quan Yik v. Hinds* (1905), 2 C.L.R. 345; *Mitchell v. Scales* (1907), 5 C.L.R. 405.

<sup>12</sup> No. 3 of 1966.

<sup>13</sup> Merchant Shipping (Liability of Shipowners and Others) Act, 1958, 6 & 7 Eliz. 2, c. 62.

<sup>14</sup> 4 & 5 Eliz. 2, c. 74.

(ii) *British Merchant Shipping Act, 1894*. This enactment<sup>1</sup> is divided into fourteen parts, some of which apply to the New Hebrides automatically, and some of which do not. Part I, dealing with the registration of British ships, applies to all places where Her Majesty has jurisdiction, and hence to the New Hebrides.<sup>2</sup> The British Resident Commissioner is a registrar of British ships. Part II, dealing with masters and seamen, is not territorially applied, but certain of its provisions apply to all British ships within the jurisdiction of a United Kingdom registrar, which includes the British Resident Commissioner.<sup>3</sup> However, it is doubtful if the penal sections of this part apply on the principle of *expressio unius est exclusio alterius*; for these are not among the sections mentioned to apply to British ships registered outside the United Kingdom. Parts III, concerning passenger ships; IV, concerning fishing boats; V, concerning safety at sea; VI, concerning shipping inquiries; VII, concerning freight; VIII, concerning liability of shipowners;<sup>4</sup> IX, concerning wrecks; X, concerning pilotage; XI, concerning lighthouses; and XII, concerning the marine fund, are silent on the question of applicability, which must be deduced from the context. Part XII, concerning legal proceedings, applies to the whole of Her Majesty's dominions, and hence does not apply to the New Hebrides. Part XIV, which is supplementary, contains a provision<sup>5</sup> for designated officers (among whom is the British Resident Commissioner)<sup>6</sup> to exercise the functions of a British consular officer which are specified in various of the parts.

The other maritime Acts of the United Kingdom are silent on the question of applicability, except: The Maritime Conventions Act, 1911,<sup>7</sup> which does not apply to the New Hebrides;<sup>8</sup> Pilotage Act 1914,<sup>9</sup> which applies to all British ships;<sup>10</sup> the Merchant Shipping (International Labour Conventions) Act, 1925,<sup>11</sup> which does not apply to the New Hebrides;<sup>12</sup> the Merchant Shipping (Safety and Load Line Conventions) Act, 1932,<sup>13</sup> which also does not apply to the New Hebrides,<sup>14</sup> but may be applied thereto by Order in Council; the Ships and Aircraft (Transfer Restriction) Act, 1939,<sup>15</sup> which applies to British ships registered in the New Hebrides<sup>16</sup> the Merchant Shipping Act, 1948,<sup>17</sup> which does not apply to the New Hebrides,<sup>18</sup>

<sup>1</sup> 57 & 58 Vict., c. 60.

<sup>2</sup> s. 91.

<sup>3</sup> ss. 88, 261.

<sup>4</sup> The Shipowners' Liability (New Hebrides) Order, s. 1., No. 1307 of 1965 extends the Merchant Shipping (Liability of Shipowners and Others) Act, 1958, and also Part VIII of the British Merchant Shipping Act, 1894 and s. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900.

<sup>5</sup> s. 737.

<sup>6</sup> s. 1., No. 707 of 1955; *Western Pacific High Commission Gazette* (1955), p. 173.

<sup>7</sup> 1 & 2 Geo. 5, c. 57.

<sup>8</sup> s. 9 (1).

<sup>9</sup> 2 & 3 Geo. 5, c. 31.

<sup>10</sup> s. 61.

<sup>11</sup> 15 & 16 Geo. 5, c. 42.

<sup>12</sup> s. 6.

<sup>13</sup> 22 Geo. 5, c. 9. And sections replaced by the Merchant Shipping (Load Lines) Act, 1967, c. 27.

<sup>14</sup> s. 36.

<sup>15</sup> 2 & 3 Geo. 6, c. 70.

<sup>16</sup> s. 4.

<sup>17</sup> & 12 Geo. 6, c. 44.

<sup>18</sup> s. 9.



and the Merchant Shipping (Liability of Shipowners and Others) Act, 1958,<sup>1</sup> which has been specifically applied by Order in Council.

The Protocol prohibits the registration of vessels in the New Hebrides other than those which are intended to sail under either the British or French flag.<sup>2</sup> The High Commissioners are authorized individually to prescribe the regulations governing vessels of their respective flags, and supervise them. Since only British subjects may own a British ship, persons who are not British may not register under the Merchant Shipping Act, and this excludes the natives from seeking protection of the British flag, or becoming subject to British maritime law.

(iii) *Crown Proceedings Act, 1947*. This Act<sup>3</sup> does not apply outside the United Kingdom.<sup>4</sup> Therefore the common law rules concerning the amenability to suit of the Crown prevail in the New Hebrides.

(iv) *Companies Act, 1956*. The Protocol<sup>5</sup> refers to the two Powers retaining jurisdiction over corporations 'legally constituted according to its law'. The only English law by which companies might be incorporated is the Companies Act. Section 141 of the Pacific Order in Council, 1893,<sup>6</sup> provided for the performance of acts prescribed by Imperial Acts or Orders by officers designated by a Secretary of State. Pursuant to this, the British Resident Commissioner was designated by the Secretary of State an officer to exercise the powers of the Board of Trade in relation to companies, and to be a registrar of companies. The British administration has taken it for granted that this has authorized them to incorporate companies, and they have accordingly gone through the motions of incorporation, with deposit of memoranda and articles of association, in eleven instances, including that of New Hebrides Airways. There is, however, a distinction between registration and incorporation of a company; a company may be registered as a foreign company in several places; it may only be incorporated in one, and under a law prevailing in that place which provides for incorporation. The British Resident Commissioner may well be empowered to regulate the activities of British companies, and even to require United Kingdom companies to register in the New Hebrides; but it does not follow that he has power to incorporate initially.

The existence of such power is dependent upon the Companies Act applying to the New Hebrides. Before the Order of 1961 was made, the

<sup>1</sup> 6 & 7 Eliz. 2, c. 62, s. 11. Since Art. XXVIII of the Protocol restricts navigation legislation to the national jurisdictions, the United Kingdom Government takes the view that an amendment to the Protocol would be necessary before this Act could be applied: H.C. Deb., vol. 701, Written Answers, cols. 84, 85, 11 Nov. 1964. See The Admiralty Jurisdiction (New Hebrides) Order, S.I. No. 596 of 1965.

<sup>2</sup> Art. 28.

<sup>3</sup> 10 & 11 Geo. 6, c. 44.

<sup>4</sup> s. 52.

<sup>5</sup> Art. 1.

<sup>6</sup> S.R. & O. of 15 March 1893. This section ceased to apply in virtue of Pacific (Courts) Order in Council, 1961, s. 27. See proclamation in *Western Pacific High Commission Gazette* (1962), p. 112.

Legal Adviser to the British Resident Commissioner gave an opinion to the effect that the Act did not apply to the New Hebrides, and that the companies which purported to have been incorporated there were legally non-existent. There is no doubt that the advice was sound under the formula for the application of English law which prevailed in virtue of the Order of 1893; there is some doubt if it is still sound under that in the Order of 1961. All depends upon whether the Companies Act is one of general application.

One would be surprised to discover that Parliament intended, when enacting the Companies Act, to provide for the incorporation of entities outside the United Kingdom. For one thing, almost all the Crown's overseas possessions had their own company legislation, and the New Hebrides is one of the very few areas of British jurisdiction that did not. The draftsmen of the Act are not to be presumed to have intended either to supersede the legislation of dependencies, or to have filled the anomalous gap in the case of the New Hebrides. This presumption is fortified if the provisions of the Act are examined in detail. It will be found that the operation of the Act presupposes an elaborate technical machinery for supervision, which exists in the United Kingdom, but which cannot easily be reproduced in the Condominium, including inspectors with extensive powers.

There is an additional argument which appears to be fatal to the view that the Companies Act prevails in the New Hebrides: the Order in Council of 1961 empowers the High Court to apply statutes of general application; it does not say these statutes shall apply to the Group; it does not, therefore, invest executive authorities with statutory powers. In short, it merely permits resort to statutes for judicial purposes. It follows from this that the only statutes which can apply to the New Hebrides are those which govern legal relationships that may be the subject of judicial action; and statutes which are administrative in character are by implication excluded.

King's Regulation No. 1 of 1945<sup>1</sup> provides that every British company which has established, and would in the future establish, a place of business within the Group, must, within two months, file with the British Resident Commissioner a copy of its documents of incorporation, a list of directors and an address for service. Each year a balance sheet must be filed, properly drawn up so as to exhibit a true and correct view of the state of the company's affairs. Every prospectus inviting subscription must state the country in which the company is incorporated, and exhibit on every place where it carries on business and on its letter paper, the name of the company and the country in which it is incorporated, and whether it is limited. This is a valid supervision of companies already incorporated, but is not in itself an Act of incorporation.

<sup>1</sup> s. 2 (1).

(v) *British Nationality Act, 1948*. Section 30 of the Act<sup>1</sup> empowers the Crown to declare by Order in Council which territories under its protection are protectorates or protected States for the purpose of the Act. The British Protectorates, Protected States and Protected Persons Orders in Council 1949<sup>2</sup> to 1958<sup>3</sup> in Section 6 state that the provisions of the Act shall apply to the New Hebrides and to Canton Island as if they were protected States. The effect is that persons specified as British-protected persons by virtue of connection with those territories become British-protected persons for purposes of the Act, one of these purposes being acquisition of British nationality by naturalization under conditions less stringent than those applying to aliens. Parry<sup>4</sup> questions whether the New Hebrides are not, for purposes of the Act, part of the United Kingdom and Colonies, for the New Hebrides, he says, are not excluded from the definition of Colony in s. 32 (i) of the Act. This definition is not, however, a strict definition, but merely a formula for exclusion of the member States of the Commonwealth, and one must resort to the general definition of colony in English law, which utilizes the conception of the Crown's 'sovereignty'. Since the Crown does not exercise sovereignty over the New Hebrides, the latter cannot be classified as a Colony.

(vi) *Licensing Act, 1872*; *Adoption Act, 1958*. The Licensing Act was held in 1964 by the British High Court in Port Vila, in a review of a decision of the Magistrate's Court, not to be an Act of general application, but the same Court in 1967 held that the Adoption Act applies in the New Hebrides.<sup>5</sup>

(c) *New Hebrides legislation applying to British subjects and optants only*

By Order in Council of 24 October 1911,<sup>6</sup> the High Commissioner or the Resident Commissioner in the New Hebrides was authorized to make, alter or revoke King's Regulations for the peace, order and good government of all British subjects or persons opting for the British jurisdiction. Regulations made by the Resident Commissioner might be disallowed by the High Commissioner. Disallowance would date, however, only from the publication of the notice of disallowance, and actions taken under the disallowed Regulations would be valid. Similar powers of disallowance were vested in the Colonial Secretary.

This Order was replaced by the New Hebrides Order in Council, 1922,<sup>7</sup> which, however, re-enacted in substance the provisions relating to King's Regulations. British subjects, and optants for the British jurisdiction, are

<sup>1</sup> 11 & 12 Geo. 6, c. 56.

<sup>2</sup> No. 140 of 1949.

<sup>3</sup> No. 259 of 1958.

<sup>4</sup> *Nationality and Citizenship Laws of the Commonwealth* (1957), p. 358, n. 4.

<sup>5</sup> *In the Matter of C.S. (An Infant)*, 1967. Unreported.

<sup>6</sup> *British and Foreign State Papers*, vol. 104, p. 113.

<sup>7</sup> S.R. & O. No. 717 of 1922.



thus subjected to a legislative authority additional to that of the two Resident Commissioners, and also additional to that of the United Kingdom. The formula employed in the grant of legislative power to the High Commissioner or Resident Commissioner is the classical formula employed in all colonial constitutions, namely, a grant to legislate for the 'peace, order and good government' of the territory. This has been interpreted many times by the Courts to be a grant of plenary power, limited only territorially, and subject to the rules concerning disallowance and repugnancy.

(d) *The doctrine of repugnancy*

Early in the nineteenth century difficulties arose about the validity of colonial legislation which was repugnant to (or which conflicted with) British statutes and unenacted law. There was no doubt that, as subordinate legislatures, colonial assemblies were bound by British legislation, which applied by paramount force. Some jurisdictions, however, considered these assemblies disabled from altering even the common law, and this view was adopted by leading constitutional theorists.<sup>1</sup> As a result of a constitutional crisis in South Australia arising from this problem,<sup>2</sup> the Colonial Laws Validity Act, 1865,<sup>3</sup> was enacted to define the limits of the doctrine of repugnancy. This provided that any colonial law which might be repugnant to the provisions of any Act of Parliament 'extending to the colony' should be read subject to the Act, and to the extent of the repugnancy should be void. Conversely, no colonial law should be void for repugnancy to the law of England unless it is in conflict with the provisions of some Act of Parliament, order or regulation. The Act has been interpreted to mean that colonial laws can only be invalidated for repugnancy when in conflict with British enactments intended to apply to the colony by 'express words or necessary intendment'.<sup>4</sup> The latter formula excluded statutes, such as the Statute of Frauds, which were received as part of the common law, and came to be restricted to enactments of a constitutional character. The Act was regarded as a charter of colonial independence, and not a limitation upon it—an enabling not a restraining Act—and the presumption is that the doctrine of repugnancy is more constrictive in its application to territories not benefiting from the Act.

The Colonial Laws Validity Act applies to 'Her Majesty's possessions',<sup>5</sup> and so does not apply to the New Hebrides. The latter is thus, in the eyes of English law, in a pre-1865 condition; and the relevant statement of this position may be that of the Supreme Court of New South Wales interpreting

<sup>1</sup> Tarring, *Law Relating to Colonies* (4th ed., 1913), p. 105.

<sup>2</sup> Castles, loc. cit. (above, p. 111, n. 2), p. 9.

<sup>4</sup> *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1 at pp. 20-1.

<sup>3</sup> 28 & 29 Vict., c. 63.

<sup>5</sup> s. 1.

the Constitution of the Colony of 1828. It stated that if a United Kingdom statute extends to the territory, local 'legislative functions are then at an end'.<sup>1</sup> The situation may be that no Queen's Regulation could alter the application of any United Kingdom statute imported in virtue of the Order in Council of 1961 as an Act 'of general application'; and it is even arguable that it might not alter the common law. But the pre-1865 situation is so obscure that one cannot predict with assurance what attitude a British court would take to the problem. An added element of uncertainty arises from the fact that the instrument by which British statutes are available to the British court in the New Hebrides, namely the Order of 1961, is of equivalent status with, and not superior to, the instrument by which contradictory local legislation might be made, namely the Order of 1893. In all pre-1865 constitutions the relevant enactments were principal and not subordinate legislative acts.

The New Hebrides Order of 1922 gains for the Protocol legislative force. So far as British subjects are concerned, they are affected legally by Joint Regulations only in virtue of the Order, and therefore only in virtue of subordinate legislation. Hence the doctrine of repugnancy controls with respect to them the validity of Joint Regulations to the extent to which it controls the validity of Queen's Regulations. Needless to say, the Joint Court, being composed of judges of both nationalities, is not likely to apply a doctrine of British constitutional law, even when a British subject is involved, so that to this extent the relevance of the concept of repugnancy is not immediate. But, inasmuch as decisions of the Joint Court may have to be given effect to in British courts outside the Group, the doctrine of repugnancy might well be imported to inhibit foreign execution.

## 2. The French Jurisdiction

There is much less ambiguity in the extent of the application of French law to French citizens and optants than there is in the case of English law in its application to British subjects and optants. By a *loi* of 30 July 1900<sup>2</sup> the President of the French Republic was authorized to issue decrees for the protection of French citizens established in certain of the Pacific islands. On 28 February 1901 a *Décret*<sup>3</sup> was issued pursuant to this enactment, which regulated, from the point of view of both executive and judicial authority, the situation of French citizens in those Pacific islands which did not form part of the *domaine colonial* of France, and also did not belong to any other civilized power. This is the fountainhead of the French jurisdiction in the New Hebrides, and the *Décret* of 11 January 1907,<sup>4</sup> by

<sup>1</sup> *Ex parte Lyons, In re Wilson*, 1 Legge 140 at p. 153.

<sup>2</sup> *Bulletin officiel du Ministère des Colonies* (1900), p. 665.

<sup>4</sup> *Journal officiel de la République Française* (11 January 1907).

<sup>3</sup> *Ibid.* (1901), p. 136.

which the Convention of 1900 was promulgated, gained the force of law for French *ressortissants* in the Group in virtue of it. A subsequent *Décret* of 22 March 1907<sup>1</sup> invested the Governor of New Caledonia with the powers which he would exercise as French High Commissioner under the Convention.

Pursuant to these various texts, an *Arrêté* of 9 September 1909<sup>2</sup> provided that the promulgation in the New Hebrides of French *lois, décrets* and *arrêtés* applicable to French *ressortissants* would be a consequence of their insertion in the *Journal Officiel de la Nouvelle Calédonie*. These enactments would come into force on the Island of Efate two days after the arrival in Port Vila of the texts published in the *Journal Officiel*, and in the rest of the Group thirty days thereafter. (Provision was made for pleas of *ignorantia juris* in the event of proof that the promulgation could not have come to the notice of a defendant.) A further *Décret* of 10 December 1912,<sup>3</sup> regulating the French judicial system in the New Hebrides, contained in Article 38 a more explicit direction as to the content of French law in the Group. It directed the French court to apply

. . . la législation en vigueur en Nouvelle-Calédonie en tout ce qui n'est pas contraire au présent décret, et aux dispositions spéciales du décret du 9 Mai 1909.

Almost immediately it became clear that some French laws could not apply to the New Hebrides, for distance made the performance of some specified acts impossible within the designated time. Accordingly by *Décret* of 17 February 1916<sup>4</sup> certain articles of the *Code Civil*<sup>5</sup> requiring action to be taken within a fixed period were modified in their application to the New Hebrides. Also, the time for cassation applications to be made in respect of decisions of the *Cour d'Appel* of Noumea on appeal from the Court in Port Vila was modified.<sup>6</sup>

The Protocol of 1914 was internally implemented in the New Hebrides, following its ratification by the French National Assembly in 1922, by a Presidential *Décret* of 27 May of that year.<sup>7</sup> It thereby acquired the force of law for all French *ressortissants* in the Group. The latter are thus subject to two legal regimes, that of New Caledonia imported in virtue of Article 38 of the *Décret* of 1912 and that of the Protocol. Does the latter override provisions of the law of New Caledonia antecedently enacted? The answer lies in the relationship between treaties and legislation in the French Constitution. The Constitution of 1958, which ultimately governs the rights of French *ressortissants*, proclaims its attachment to the principles in the

<sup>1</sup> *Bulletin officiel du Ministère des Colonies* (1907), p. 190.

<sup>2</sup> No. 776/19, *Journal officiel de la Nouvelle Calédonie* (1 October 1909).

<sup>3</sup> *Ibid.* (1 March 1913).

<sup>4</sup> *Ibid.*, No. 2797 (13 May 1916).

<sup>5</sup> Arts. 55, 77.

<sup>6</sup> *Journal officiel de la Nouvelle Calédonie*, No. 2857 (7 July 1917).

<sup>7</sup> *Ibid.* (21 July 1923).



Preamble to that of 1946, one of which was fidelity to the rules of international law. Article 55 of the Constitution of 1958 provides that treaties duly ratified and published shall have the force of law even when in conflict with penal legislation. This is taken to have reversed the rule of *lex posterior derogat legi priori* which prevailed in the Third Republic, and to accord primacy to treaties over legislation, whether antecedently or subsequently enacted. If this is the law it follows that for French citizens and optants in the New Hebrides the Protocol is superior to other texts. In this respect the situations of British subjects and French citizens differ.

The relationship between French enactments and the Protocol, and the extent to which the former are imported into the New Hebrides in virtue of Section 38 of the *Décret* of 1912, was raised in the French court in the New Hebrides in 1957, and on appeal to the *Cour d'Appel* of Noumea.<sup>1</sup> The matter concerned an action brought against a French employer in the New Hebrides, who was alleged not to have granted annual leave as required by the French Labour Code of 15 December 1952,<sup>2</sup> and to have substituted therefor a compensatory payment which the Code forbids. The defendant disputed that the Code prevails in the New Hebrides, but the French court there, and also the *Cour d'Appel* in Noumea, held that it did, in virtue of the *Décret* of 1912. Before the *Cour d'Appel* the *Procureur-général* of New Caledonia delivered a long and carefully argued *réquisition* in which he surveyed the arguments of the appellant.

The appellant commenced his argument by pointing out that the Code was declared to be uniformly applicable through the whole of the *territoires d'outre-mer et territoires associés*; but the New Hebrides, being a sphere *d'influence commune*, was not such a territory. The Protocol had guaranteed that the subjects and citizens of the two Powers would enjoy equal rights of residence, protection and commerce. Since the Code could not touch British subjects and optants, and since it is inherently a uniform Code to apply equally to everyone, it could not have been the legislative intention to apply it to the New Hebrides; for to do so would offend either the principle of equality in the Protocol, or the principle of equality in the Code. The appellant also argued that judicial practice, doctrine and actual administration affirm that it is not every law which is in force in New Caledonia that applies in the New Hebrides, but only such law as the Governor of New Caledonia promulgates by *Arrêté* in his capacity of High Commissioner. The Labour Code was promulgated by the Governor in that capacity alone. An erratum subsequently added his title of High Commissioner, but an erratum may not cure a legal defect.

In his opinion the *Procureur-général* considered the proposition that all

<sup>1</sup> 'Affaire Guichard', *Recueil penant*, No. 686 (April-May 1961). *Arrêté* No. 1669.

<sup>2</sup> *Journal officiel de la Nouvelle Calédonie* (7 January 1953).

the law in force in New Caledonia is in force in the New Hebrides. This he could not concede, because the New Hebrides is juridically not part of New Caledonia. New Caledonian law could therefore apply to the New Hebrides only by specific act. All the law in force in New Caledonia had been applied to the New Hebrides on 9 May 1909; and thereafter a special promulgation by *Arrêté* of the High Commissioner would be necessary. In virtue of the *Décret* of 9 May 1909, Article 72 of the *Décret* of 12 December 1874 which conferred on the local authorities the power to promulgate laws was in force in the New Hebrides. The Court in Port Vila had referred the question to the *Ministère des Affaires Étrangères* which on 25 May 1959 gave an opinion to the effect that the provision in Article I of the Protocol respecting a quality of treatment in matters of commerce did not prevent either Government from imposing obligations upon its nationals more severe than those imposed on the nationals of the other Power.<sup>1</sup>

The *Cour d'Appel* came to the same conclusion as the Ministry, holding that the Code was not in conflict with any Joint Regulation, and was not inconsistent with the Protocol. Each Power had retained 'souveraineté' over its nationals<sup>2</sup> and French courts are not the judges of the suitability of applying to French *ressortissants* laws regularly promulgated in New Caledonia, merely on the ground that they achieve a *de facto* inequality with British subjects. If this inequality arises, then it may be cured by similar British action; inequality by itself 'n'est pas un empêchement légal'. That the Labour Code prevails in the New Hebrides is clear, not because of Section 38 of the *Décret* of 1912 alone, but also because of that of 9 December 1909, which prescribes the time at which laws promulgated in the New Caledonian *Journal officiel* shall apply in the New Hebrides. The mere publication of the Labour Code in the *Journal officiel* by *Arrêté* of the Governor sufficed to extend it to the Group.

### 3. The Ambiguous Nature of the National Jurisdictions

The provisions in the Protocol respecting equality between the subjects and citizens of the two Powers, and their optants, inherently contradict those providing for exclusive national jurisdictions, as the case just discussed illustrates. In almost every field this internal inconsistency manifests itself. For example, the French law concerning 'recognition' of infants born out of wedlock creates a *de facto*, and indeed a *de jure*, inequality with British illegitimates; for it means that French illegitimates may have rights to maintenance whereas the British have none. There is also an ambiguity in the expressions 'British subject' and 'French citizen', for the former does not comprehend British-protected persons, who are, at the

<sup>1</sup> *Ministère des Affaires Étrangères, Feuille No. 167 of 1959.*

<sup>2</sup> N.B. the English text says 'jurisdiction'.

same time, not aliens entitled to opt between British and French jurisdiction; and the latter is more restrictive than *ressortissant*. The problem of the British-protected person is important because of the number of Solomon Islanders resident in the Group. There is an administrative agreement between the British and French that these will be treated as if they were British subjects for the purpose of determining the jurisdiction to which they are subject.<sup>1</sup>

The question of competitive air traffic in the New Hebrides also illustrates the ambiguous notion of exclusive national jurisdictions. *Union de Transports Aériens* began scheduled services from Noumea to Santos, and the French Government took the position that the Protocol, having given it the right to deal with its own nationals, empowered it to permit flights. When Fiji Airways began a through service from Nadi to Honiara in competition with *Union de Transports Aériens* the question arose whether the same argument would apply to empower the British Resident Commissioner to issue the necessary traffic authorization.

Another ambiguity in the national jurisdictions arises with respect to the police. In 1962 a certain Carmen Presa was prosecuted under French law for insulting (*outrager*) a French *gendarme* who, while off duty, spoke to her about the sale of alcohol to natives in violation of Condominium Joint Regulations and the provisions of the Protocol. She was acquitted by the French national court, and the acquittal was upheld by the *Cour d'Appel* of Noumea. When the matter went to the *Cour de Cassation*, the latter quashed the decision on the ground that the provisions of the Protocol concerning sovereignty over the nationals of the two Powers gave the police jurisdiction over French *ressortissants*; and insult to the police remained a criminal offence irrespective of whether or not the police at the time were validly exercising their powers under the Protocol.<sup>2</sup>

## THE JUDICIAL SYSTEM

### 1. The Condominium Jurisdiction

The judicial system devised for the Condominium of the New Hebrides is unique, and raises unique problems: there is a Joint Court for Condominium matters, and there are separate British and French courts; the British and French judges who preside over their respective national jurisdictions also constitute the judges of the Joint Court. The latter is

<sup>1</sup> Instructional Memorandum on the Status of the British Half-Caste in the New Hebrides 7 July 1949, No. 8. The illegitimate half-caste children of British and New Hebridean persons may apply for registration as locally protected British persons. Having obtained registration they are treated locally for all administrative and judicial purposes as British subjects. This has been applied by the British Court: *In the Matter of C.S. (An Infant)*, unreported, but holding that the status is personal to the legitimated, so that it is not heritable.

<sup>2</sup> *Affaire Carmen Presa*. Unreported.



almost the only instrumentality of Condominium Government to receive adequate treatment in the Protocol, which accords it an elaborate jurisdiction. But, since the immediate problem in 1906 was disputed claims over land, most of the jurisdictional provisions in the Convention (and later the Protocol) are concerned with these; and the bizarre situation is created of a court with extensive machinery existing mainly to deal with questions of property, in a territory where no law of property prevails. The Joint Court also acts as a court of appeal from decisions of the courts of first instance, and from the native courts in civil matters, and in some cases is itself in criminal matters a court of first instance.<sup>1</sup> The courts of first instance consist of both British and French District Agents and an assessor with deliberative status; the native courts are presided over by either the British or the French District Agents acting in alternate months with two assessors with consultative status. In both the courts of first instance and the native courts little opportunity exists for preserving the separation of powers: the District Agents collect the evidence, summon the witnesses, charge the accused, examine the witnesses and the accused, decide the case, and, with the help of assessors, pronounce sentence. Needless to say the French District Agents conceive their function in French terms, and there is a tendency for the two stages of *instruction* and trial to be telescoped. Not surprisingly, the process takes on an inquisitorial aspect, and this has influenced the practice of the British District Agents. The judicial machinery of the Condominium is effective enough, but the enforcement machinery, depending as it does on the quasi-national police forces, whose separation is maintained at the French instance, often breaks down. Sentences of imprisonment are carried out by handing the convicted accused over on a warrant to the police of the District Agent's national jurisdiction, so that it is a fortuitous matter if they are served in a British or a French prison.

<sup>1</sup> The jurisdiction of the Joint Court is as follows: it hears appeals from the native courts if the amount involved is over £40 in civil cases, and from the courts of first instance; it reviews convictions entered in penal matters by the native courts (but does not entertain appeals against their decisions) and by the court of first instance when the sentence is more than one year's imprisonment.

There is an appeal to the Joint Court from all decisions of the courts of first instance: Art. XXI (10) of the Protocol. A copy of each judgment of the court of first instance involving sentence of imprisonment must be sent by the president to the Joint Court with certified copies of all the documents. The Joint Court examines these judgments and may, within a month, call the case before it for revision.

The Joint Court also has primary and final jurisdiction in civil cases concerning land subject to registration but unregistered, except, perhaps, actions between natives, which might be entertained by the native courts; in all actions affecting registered land when the dispute is between natives and non-natives; in all proceedings for the registration of land; and in all cases if the parties agree. It has similar jurisdiction in more serious criminal cases. It would also seem to have a general power to call before it for review any decisions of the subordinate tribunals under Art. XII (4) of the Protocol. The criminal jurisdiction of the Joint Court does not extend under the Protocol to the Southern District.

The Joint Court is composed of a president and a judge nominated by each of the Condomini. The president must be of neutral nationality, and he is appointed by the King of Spain. The first appointee to this office was a Spanish subject, the Count of Buena Esperanza, who retired in 1934. When he retired, the Spanish Republican Government was invited to appoint his successor, whose name was Bosch-Barrett. On his retirement shortly before the Second World War a problem arose out of France's relations with the new Nationalist Government of Spain. Accordingly, it was decided to shelve the matter of a successor and, on 24 November and 5 December 1939 Notes<sup>1</sup> were exchanged between the British and French Governments in which it was agreed that all the president's functions would be exercised by the British and French judges acting jointly. Should the latter disagree on a judgment, they are required to leave the case until the president returns. Since he has been temporarily absent for a quarter of a century, and there is no sign of his return, this means that the judges must compromise. When each judge claims that his national system is competent, it is the president who must settle the question. During his temporary absence, the national judges are required to go arm in arm and metamorphose themselves into an arbitrator of their respective differences on this issue.

The functioning of the Joint Court is undoubtedly disabled by the circumstances under which it is called upon to perform its duties, and particularly by the absence of a president. One member of the Court has gone on record as follows:

*L'expérience a en effet montré que l'unité de vues n'a pas toujours été la caractéristique dominante de cette présidence bi-céphale, aussi bien dans le domaine juridictionnel que sur le plan administratif, surtout lorsque, ce qui fut souvent le cas jusqu'à une date récente, l'absence du juge anglais titulaire amenait sur le siège des intérimaires dont quelques uns même, fonctionnaires de la résidence britannique, excipaient d'instructions de leur supérieur hiérarchique pour n'accepter de connaître que de certaines catégories d'affaires.*

He has also referred to the difficulties of the absence of a president in the administration of the Court. The Condominium administration has tended to intrude into the areas properly designated in the Protocol as those of the president, particularly in matters of conditions of service and remuneration of the subordinate personnel of the Court. This has occasioned protest from the judges in several instances. The member concludes:

*Si bien qu'en définitive le Tribunal Mixte a vu son statut s'éloigner en fait de plus en plus de ce qu'il devrait être selon les textes en vigueur, destinés, dans l'esprit de leurs auteurs, à garantir l'indépendance et l'autorité de la juridiction souveraine du Condominium.*

<sup>1</sup> The New Hebrides Order in Council, 1961, s. 1., 1961, No. 1831.

Mais il en est ainsi de beaucoup de choses dans le Condominium, la lenteur de la procédure diplomatique appliquée à des problèmes d'administration dont beaucoup sont fonction de facteurs purement locaux conduisant peu à peu les autorités locales à substituer à des dispositions vieilles des pratiques qu'elles estiment mieux adaptées aux circonstances.<sup>1</sup>

The British and French judges preside separately over the Joint Court in cases governed respectively by English and French law.<sup>2</sup> Together the two judges constitute the Court, but in criminal cases they are assisted by a non-native assessor with a deliberative vote. On the British side a judge is appointed to the High Court of the Western Pacific (formerly he was a Judicial Commissioner who was appointed to the High Commissioner's Court) and *ex officio* he is a judge of the Joint Court. His terms of appointment and his conditions of service are contained in the conditions of service and the terms of appointment offered to him before he comes to the New Hebrides. The position is the reverse with the French. The French judge is appointed judge of the Joint Court and is, *ex officio*, the French national judge of the New Hebrides. His conditions of service are the same as any other judicial officer in the French service.

The law applied by the Joint Court is as follows: in cases concerning land and the recruitment of native labour, the provisions of the Protocol (the latter point is now a dead letter); in other cases involving natives and non-natives, the national law of the non-native; in cases involving natives, the native code; and, in appropriate cases, the general principles of law and equity, the proper law of contracts, the national law of the defendant and the joint Regulations. Parties may be represented before the Joint Court by counsel, but the Court may suspend or withdraw the right of pleading.

The courts of first instance deal with offences under the Protocol and Joint Regulations, and are composed of two District Agents, one British and one French, and an assessor who is of the same jurisdiction (British or French) as the accused, except when the accused is a native, when the assessor must be of a nationality different from that of the nationality of the president of the court. The administration of justice in at least some cases before the courts of first instance can only be described as farcical. In May 1964 the Joint Court quashed two convictions for irregularities so gross that the Chief Justice of the Western Pacific was led to comment that he had never met with cases which contained so many errors of law and errors of procedure.<sup>3</sup>

<sup>1</sup> Restricted circulation.

<sup>2</sup> In order to ensure the independence of the Joint Court from the local administrations, the two Governments from time to time by exchange of Notes fix the judges' salaries, terms of employment, leave, passage home, pensions and other matters of tenure. The latest of these exchanges is 15 December 1931: *British and Foreign State Papers*, vol. 134, p. 252.

<sup>3</sup> *Hagen v. The Public Prosecutor*; *Leeman v. The Public Prosecutor*. Unreported.



The criminal procedure in the Joint Court is governed by Article XIV of the Protocol; in the court of first instance by Article XXI (8); and in the native court by Article VIII (11): it is inspired by the procedure in French law in cases before the *justices de paix*, the *tribunaux de simple police* and the *tribunaux correctionnels*, and in English law that employed in quarter sessions. The official languages are French and English, and all documents and transcripts of hearings must be in translation. The Joint Court has full power to make rules of procedure, and when it does so these modify the procedure envisaged in the Protocol. Judgments of the Joint Court may be enforced without exequatur in the territories of Great Britain and France. The Protocol provides that the procedure in the Joint Court in civil cases shall be that of the county court in England, and of the *justices de paix* in France; in police cases that of courts of summary jurisdiction in England and the French police courts; and in criminal cases those of quarter sessions and the *tribunaux correctionnels*.<sup>1</sup> The Joint Court was empowered to determine and settle by an Order the modifications of those rules which might be necessitated, either by local circumstances and the differences between the two systems of law, or by the provisions of the Protocol.

Rules of Procedure of the Joint Court were made at Port Vila in December 1910, and issued by the president, the judges, the registrar (*greffier*) and the public prosecutor (*procureur-général*). They provide for a summary procedure for breaches of the Convention of 1906 (now the Protocol of 1914) and the Regulations made thereunder, and for police offences. Summonses may be issued by the public prosecutor, or on the application of the plaintiff to the Court. The accused is brought before the Court on a warrant and preliminarily examined by the public prosecutor, who must satisfy himself that there is sufficient *prima facie* case before proceeding with the prosecution. This procedure highlights the ambiguous nature of the public prosecutor's office. The Protocol refers to this official, who is to be a neutral, as *ministre public* in the French text, and public prosecutor in the English, apparently in ignorance of the fact that their respective roles in the two legal systems by no means coincide. In English law a *prima facie* case must be made out in indictable cases to a magistrate, who then commits the accused for trial. The magistrate does not himself, however, investigate the facts but leaves this to the police. In summary cases it is entirely for the police to collect the evidence and establish their case. Under the French system, however, a *juge d'instruction* plays an inquisitorial role in the collection of evidence before trial commences. Under the Joint Court Rules the public prosecutor's office conforms more nearly with that of the French *juge d'instruction* than with that of the English

<sup>1</sup> Art. XIV.

magistrate in a preliminary hearing, irrespective of whether the defendant is subject to English or French jurisdiction. Since, however, the office of public prosecutor is vacant and its functions performed *ad hoc*, the tendency has been for the French procedure to be followed when a French *ressortissant* is the defendant, and for the English to be followed when the defendant is British. In the one case the officer appointed acts as a *ministre public*, in the other he acts as a public prosecutor.

The rules of evidence are rudimentary. It is provided that evidence may be objected to, and the Court may disallow any questions put on cross-examination which appear to it to be irrelevant, oppressive or merely vexatious. Provision is made for examination, cross-examination, re-examination and recall by leave. The Registrar notes the substance of all oral evidence, which is also translated into the alternative language. Where the French and English traditions of evidence vary, as in the matter of leading or hearsay, there is a tendency to grant counsel the maximum latitude allowed by either system. Inevitably, however, the judges as well as counsel are constrained by their legal traditions in the evaluation of evidence.

## 2. The National Jurisdictions

The two Governments in the Protocol<sup>1</sup> undertook to establish courts with jurisdiction over all civil (including commercial) cases in the Group, other than those reserved to the Joint Court. In civil cases these courts would have jurisdiction over actions between non-natives, and the respective jurisdictions of the French and British courts would be determined by reference to which of the two legal systems was the proper law of the contract, or within which of them an act or thing originated; or, in all residual cases, by reference to the national law of the defendant.

In criminal cases non-natives are exclusively justiciable by the court of their own nationality, or in the event of their being neither British subjects nor French citizens, the nationality applied to them. If the prosecution of an offence or a crime involves both persons justiciable by the national courts and persons justiciable either by the Joint Court or by the native courts, all the accused without distinction are to be charged before the national court concerned. If, however, both national courts have jurisdiction, the natives are to be brought before the Joint Court after judgment has been delivered by the national courts, in so far as the persons justiciable by those courts are concerned. If both national courts declare themselves competent or incompetent to take cognizance of any particular case, the president of the Joint Court (or in effect both the national judges) decides on the jurisdiction.

<sup>1</sup> Art. XX.

The determination of the criminal jurisdiction according to these rules is simple enough, but the problems of determining the civil jurisdiction would arouse any comparative lawyer's enthusiasm. In effect, the jurisdictional rules leave the question of the proper law of the contract, or the law governing a tort, the locus of an event, or the status of immovables, to the solution of the conflict of laws rubrics of each national system. If the conflict of laws were a genuinely international system, the problem would be manageable. In fact, however, English law and French law differ, in some respects radically, in their characterization of an event, in the selection of the law governing it and in the attribution of a personal law in matters of personal status. Furthermore, one of the two legal systems may refer the question to the other, only to find it referred back. Finally, certain of the conflict rules select the governing law by reference to the place where an event occurs, and the law prevailing in that place. But application of this criterion in the New Hebrides is question-begging, because the issue is which of two alternative local laws is to be the prevailing law. In the event of the conflict of laws rules failing to make a clear selection between the two relevant legal systems, it might be expected that the two judges, acting as president, would resort to the residuary criterion of the national law of the defendant.<sup>1</sup>

The Protocol is ambiguous on the question of the law governing actions in the national courts between natives and non-natives. As has been seen already, Article XX (1) states that the two Governments mutually undertake to establish courts with jurisdiction over all civil cases in the Group, other than those reserved to the Joint Court. There would not appear to be any great doubt that a national court has jurisdiction when a native institutes proceedings, other than with respect to land subject to reservation. But when the position is reversed, there would seem to be a vacuum, for when the native is the defendant the residual reference to the governing law, when the matter is not regulated by the proper law or the law of the *res*, fails because the native is subject to no legal system. The point appears to have been overlooked by the draftsmen and also by the commentators. The *Encyclopédie Dalloz*<sup>2</sup> says:

Les textes ne précisent pas quelle est la juridiction compétente en cas de litige entre un indigène et un Français demandeur. La compétence des Tribunaux indigènes étant limitée aux procès n'intéressant que des indigènes, un tel litige relève donc de la justice française.

<sup>1</sup> In 1963 the British court dealt with an action arising out of a lease made between two British subjects, each of whom assigned his interest to a French national, so that both plaintiff and defendant were French for the purpose of choice of law.

<sup>2</sup> *Procédure II, territoires d'outre-mer*, s. 360. The present Court takes the view that the national court of the non-native has jurisdiction and the non-native's national laws are applicable, but the matter has not been tested.



The gap was recognized by the draftsmen when they considered land suits, for they included a provision<sup>1</sup> that in such suits involving natives, the law applied is to be that of the Power of which the non-native is a dependant; and in suits between natives the 'general principles of law' are to apply. The bad draftsmanship is evident, however, in the partly repetitive and partly supplementary character of this provision when read with the provisions which primarily give jurisdiction to the Joint Court.

The Protocol is also silent on the question whether the national administrations are to be amenable to the jurisdiction of the national courts. The French view is that it could not have been the intention of the draftsmen of the Protocol, when providing for British subjects and French citizens to be governed by their own laws, to deny them remedies against the Government which they would have in their national territories. It is argued that the French *droit administratif* must prevail in the Group; that when the French administration is concerned, proceedings to quash administrative decisions may be taken in the *Conseil d'État*. And whenever in France a *tribunal judiciaire* would be competent to entertain actions against the administration, this competence is enjoyed by the French national court with respect to the French national administration. The situation of the British subject in the New Hebrides is not quite so clear. In the absence of legislation the only remedies are those of the prerogative writs. These have been available throughout the Crown's dominions, but, except as authorized by statute, not in territory under the Crown's foreign jurisdiction.<sup>2</sup>

The Western Pacific (Courts) Order, 1961, would seem to confer a jurisdiction on the High Court to issue the prerogative writs, but the legislation which in the United Kingdom enables suit against the Crown in contract or tort by ordinary writ had probably not been imported into the New Hebrides. It seems then that the French citizen might enjoy greater rights against the French administration than the British subject enjoys against the British administration. But if this is the case there is a lack of equilibrium in the matter of civil status which in spirit contradicts the principle of equality of administration governing the Protocol.

If either or both national administrations are amenable to the national courts, the question arises where the activities of the Condominium can be attacked through the national courts, on the ground that joint action of the two Resident Commissioners (or their Condominium departments) is only

<sup>1</sup> Art. XXVI (9).

<sup>2</sup> *R. v. Cowle* (1759), 2 Burr. 834. It has, for example, been held that the writ of *habeas corpus* would not issue out of an English court with respect to imprisonment in the leased territory of Tientsin: *Re Ning Yi-ching* (1939), 56 T.L.R. 3. Cf. *Ex parte Mwenya*, [1960] 1 Q.B. 241, at p. 275; *Abdul Rahman Al Baker v. Alford*, [1960] A.C. 786; *In re Kuwait Criminal Case*, International Law Reports, vol. 26, p. 250.

a manifestation of the national sovereignty of each of the two Powers. Why should the possibility of quashing decisions of the Crown's agents by means of the prerogative writs not extend to decisions of those agents acting jointly with the agents of another country? And why, conversely, should the French citizen not enjoy rights against the French administration when it is acting jointly which he would have if it were acting alone? At this point basic theory concerning Condominium becomes relevant.

In French law the citizen has a right of action against a *collectivité publique* whenever officials in their public capacity either act or fail to act, and, as a result, the citizen is injured. If the act or nonfeasance constitutes a *faute de service*, the *collectivité* alone can be sued; but if it constitutes a *faute personnelle*, as when it is motivated by malice or occasioned by serious errors or conscious violation of the criminal law, the official himself may be sued. A French citizen injured in the New Hebrides as a result, for example, of the bad state of the roads, might wish to sue in the French national court either France, the Condominium or the officers responsible for the roads. Could he do so?

The *Conseil d'État* persistently refused to entertain actions against the French Government respecting administrative acts and omissions of French officials in the protected States of Morocco and Tunisia, on the ground they acted as agents of those States and not of France. It might be concluded from this that the French Government as such would not be responsible if the act or omission was one of the Condominium and not the French national service, because the Condominium is a separate legal person. The injured party must then look to the Condominium. Should suit against the Condominium not be possible in the Joint Court, the injured party might wish to institute it in the French national court. The argument supporting the competence of this latter tribunal in respect of the Condominium is as follows: the fundamental separation in French law of the administrative and judicial authorities applies in the New Hebrides only in respect of the French national services; considering its historical origins and its actual purposes, it cannot affect other administrations. Therefore, it is arguable that the Condominium services are amenable to the jurisdiction of the courts set up in application of Article XX of the Protocol, and whose competence extends to all civil matters not attributed to the jurisdiction of the Joint Court in virtue of Article XII. On the other hand, the plaintiff might be met with the defence that the Condominium is immune from suit as an international person, or that, whatever might be the case in French law, English law as it prevails in the New Hebrides does not permit suit against the Crown; and in virtue of the principle of equality, a French citizen cannot have a wider recourse than a British subject.

Finally, the injured party might sue the official directly in respect of a *faute personnelle*. For example, he might sue the *chef de service des travaux publics*, who through alleged negligence in the exercise of his functions (e.g. the faulty construction of a bridge or the failure to indicate excavation) has caused injury or death within the comprehension of Articles 319 and 320 of the Code Pénal. If the act or omission is particularly grave, the injured party would have a civil action for *dommages-intérêts*.

(a) *The British jurisdiction*

In 1902, even before the creation of the Condominium, a British Resident Deputy Commissioner was appointed to the New Hebrides, and given power to exercise the judicial jurisdiction of the Court of the High Commissioner for the Western Pacific. This jurisdiction was founded on the Pacific Order in Council, 1893, made under the authority of the Foreign Jurisdiction Act, 1890, and the British Settlements Act, 1887. It extended to criminal charges against nationals of any country, and to civil matters in which both parties were British subjects, or had consented to the jurisdiction. The internal implementation of the Convention of 1906 by Order in Council on 2 November 1907 achieved the necessary modification to this system.

The Pacific Islanders Protection Act, 1875,<sup>1</sup> authorized the Crown to exercise power and jurisdiction over its subjects, and to create a court of justice with civil, criminal and admiralty jurisdiction over them, with power to take cognizance of all crimes and offences within the territorial or admiralty jurisdictions. After 1907 the powers of the court of justice were exercised in relation to previous residents in the New Hebrides by a judicial commissioner, who in 1961 became a judge of the High Court in the Western Pacific. He has always acted also as British judge on the Joint Court. The Order of 1893 set up a complete judicial system for the Western Pacific, with district courts and a supreme court to act also as a court of appeal, sitting in Suva, and their general powers included bankruptcy, admiralty, probate and divorce. These powers were stated to be those exercised by the corresponding courts in England.

In 1961 a new Western Pacific (Courts) Order in Council<sup>2</sup> was made, which modified the provisions of that of 1893 respecting the administration of justice. It came into force on 18 April 1962. The High Commissioner's court disappeared, and was replaced by a High Court of the Western Pacific, whose powers are those of the High Court of Justice in

<sup>1</sup> 38 & 39 Vict., c. 51, s. 6.

<sup>2</sup> S.I. No. 1506 of 1961. In 1965 the Admiralty jurisdiction of the High Court of England as defined in s. 1 of the Administration of Justice Act, 1956, was extended in respect of ss. 3-8 to the New Hebrides: s. 1, 1965, No. 596; *Hansard*, H.C., vol. 791, Written Answers, col. 84, 11 November 1964.



England. It consists of a Chief Justice and two judges, all sitting separately. One judge is the British judge in the New Hebrides. Appeals from judgments of the High Court go to the Court of Appeal of Fiji. In virtue of an Ordinance of 31 March 1949, the British judge in the New Hebrides is a member of this Court as of right except when it is reviewing his own decisions. From the Court of Appeal an appeal lies to the Privy Council.

In 1962 a magistrates court for British subjects was set up by Queen's Regulation.<sup>1</sup> It is presided over by the British District Agent with limited jurisdiction, and, save for the fact that its procedure is English and only one District Agent sits on it, it is not very distinguishable in form from the inferior tribunals of the Condominium. It applies Queen's Regulations and Sections 15 and 16 of the Western Pacific (Courts) Order in Council.

(b) *The French jurisdiction*

Like the English, French judicial jurisdiction in the New Hebrides antedated the creation of the Condominium. A *loi* of 30 July 1900,<sup>2</sup> made effective by Presidential *Décret* of 28 February 1901,<sup>3</sup> authorized the President of the French Republic to issue decrees of administrative and judicial character to assure the protection and guarantee the rights of French citizens in the islands of the Pacific, which were neither French colonies nor under the jurisdiction of any other civilized Power. The *Décret* of 28 February 1901 conferred on the Governor of New Caledonia the functions of a Commissioner-General of the Republic in the Pacific, including regulatory and general police powers over French residents or traders in the New Hebrides. By *Arrêté* of 20 October 1902 the Commissioner-General designated a *commissaire-délégué*, charged with judicial powers not exceeding those of a *juge de paix à compétence étendue*. Appeals might be taken from his judgments to the *Cour d'Appel* in Noumea. Crimes committed by French citizens were justiciable before the *Cour d'Assises* at Noumea, after preliminary investigation by the *commissaire-délégué*.

By decrees of 1909 a special French Tribunal for the New Hebrides was created, invested with the competence of a *justice de paix à compétence étendue* and that of a *tribunal criminel*. These decrees also provided for appeals to the *Cour d'Appel* of Noumea, determined the applicable law to be that in force in New Caledonia and designated the procedure to be followed.<sup>4</sup> Appeals from the jurisdiction of *justice de paix* are taken to the *Cour d'Appel* in Noumea.<sup>5</sup>

<sup>1</sup> No. 3 of 1962.

<sup>2</sup> *Bulletin officiel du Ministère des Colonies* (1900), p. 665.

<sup>3</sup> *Ibid.* (1901), p. 136.

<sup>4</sup> *Décrets* of 9 May 1909 and 9 September 1909, *Journal officiel de la Nouvelle Calédonie* (1 October 1909).

<sup>5</sup> The personnel of the *justice de paix* consists of: a *juge de paix à compétence étendue*, who, under a *Décret* of 22 June 1934 (*ibid.*, No. 3756, 15 October 1934), is the French judge of the Joint Court; an officer appointed by the High Commissioner on the recommendation of the *procureur-*

The French criminal court, subject to the indictable jurisdiction of the Court in Noumea, deals with all crimes under French law, and follows the procedure of the *tribunaux de police correctionnelle* in France. It consists of a *conseiller* of the *Cour d'Appel* of Noumea as president, a judge of New Caledonia and a judge of the New Hebrides, who is usually a member of the French administration in the Group, two assessors who are French citizens, chosen by ballot from a list annually prepared by the president of the Court of Noumea, a representative of the *ministère public*, who is an official of the French administration designated by the *procureur-général* of the *Cour d'Appel* of Noumea, and a registrar.

On 1 July 1938 the *Conseil d'État* in the case of *Jabin-Dudognon*,<sup>1</sup> considered its jurisdiction with respect to the status of the chief of the medical services established by the French authorities in the New Hebrides, who was also physician-in-chief of the French hospital at Port Vila. He was dismissed from these posts by the French Resident Commissioner, and on appeal to the *Conseil d'État* contended that the dismissal was wrongful. The French Government argued that the *Conseil d'État* lacked jurisdiction, on the ground that the Resident Commissioner's powers derived, not from French administrative law, but from the Protocol, and hence from a treaty concerning joint sovereignty. The *Conseil d'État*, however, held that it had jurisdiction. The French medical services were subject to French law alone, because the Condominium was not an international organization. It was pointed out that in the Protocol each Power had retained sovereignty in the New Hebrides over its own nationals; and that it seemed to follow from this provision, and from the Protocol as a whole, that the public services set up in the Group by France, were placed under its exclusive authority, and subject to French law. In particular, individual disputes in respect of rights and duties of the officials belonging to these services are subject to French administrative jurisdiction. Since the New Hebrides did not fall within the jurisdiction of any particular administrative court, the *Conseil d'État* had direct jurisdiction to hear such cases.

#### NATIVE ADMINISTRATION

The attitude towards the natives of the signatory Powers of the Convention of 1906 is clarified in the Instructions issued to the British and French High Commissioners.<sup>2</sup> The object of Article VIII (2), which

*général*; and a registrar-notary (*greffier-notaire*). The office of deputy to the *procureur-général* was created by Art. VIII of the *Décret* of 9 May 1909, and Art. XXVII of that of 10 December 1912. There is also a French bailiff (*ibid.*, 1 March 1913).

<sup>1</sup> *Annual Digest*, 1938-40, Case No. 22. '*Affaire Sachon*', *Dalloz hebdomadaire* (1940), p. 31, holding that only acts of the French services are subject to review by the *Conseil d'État*.

<sup>2</sup> *British and Foreign State Papers*, vol. 100, p. 521.

prohibits the natives from acquiring in the Group the status of subject or citizen of either Power, or from being under the separate protection of either Power, was stated to be the prevention of undesirable rivalries.<sup>1</sup> One of the purposes of the Convention was to place the natives under a regular authority to whom they could look for help and protection, but

... for some time to come it will no doubt be impossible, in the peculiar conditions of the Group, to make such protection thoroughly effective.

Meanwhile the High Commissioners were instructed to ensure the cessation of inter-tribal warfare, and the abolition of cruel and degrading customs. They were also instructed to use the best means at their disposal 'to raise generally the level of moral and material prosperity among the natives'.

The effect of the Convention and Protocol was to subject the natives of the New Hebrides to an administrative regime while depriving them of the possibility of attaining equal civil status with the Europeans in the Group. It was, of course, envisaged that the natives would remain under the customary jurisdiction of the chiefs, and that all they would need would be protection against exploitation by whites, and against the aggression of each other. To this end they would be regulated by two separate texts, the provisions of the Protocol concerning native labour<sup>2</sup> and the codification of native law.

The first step that has been taken towards bringing the native into consultation with the Joint Administration has been the creation of local councils within sub-districts, tribal or village areas of the Administrative Districts. These councils are created by joint decision of the Resident Commissioners, who nominate the representatives and specify their terms of office. Complete discretion to terminate the councils or annul appointments is reserved to the Resident Commissioners. The authority vested in the councils is quite considerable, and purports to be based on Article VIII (3) of the Protocol, which invests the High Commissioners with a general 'authority over the native chiefs' and the 'power to make administrative and police regulations binding on the tribes, and to provide for their enforcement'. This power is delegated by Joint Regulation<sup>3</sup> to the local councils, who are to be responsible for the maintenance of law and order, as well as for sanitation and census. The councils are given 'power to issue local notices, applicable to all natives resident in the sub-district or area under its control', in the matters of maintenance of law and order, sanitation and census. They are also given power, with the approval of the District

<sup>1</sup> Natives have no entitlement to a passport, though they travel on an identity document: Joint Regulation No. 5 of 1951. See *Hansard*, H.C., vol. 735, Written Answers, col. 27.

<sup>2</sup> It was agreed on 14 February 1967 that the labour provisions of the Protocol would be repealed. New local labour legislation is on the point of enactment, but the Protocol has not yet been amended. See *ibid.*, vol. 738, col. 1162, 20 December, 1966.

<sup>3</sup> No. 9 of 1957.



Agents, in any matter not already covered by legislation, 'where such local rules are desirable or required for the welfare and proper development of the people in its area.' The Resident Commissioners reserve the right of disallowance, and insist on prior approval for any local rule involving the collection of revenue. Each village within a sub-district appoints a person who is responsible to the local council for the application within the village of any local rules made by the council. Penalties are provided for breach of these local rules.

It is obvious that institutions such as the local councils cannot function without authority to collect and expend revenue. In 1959 the Resident Commissioners authorized themselves<sup>1</sup> to make rules for the establishment of local council funds, the remuneration of members and employees of the councils and the manner in which the funds would be expended, invested and audited. Funds are established by local councils with the approval of the Resident Commissioners, and they are composed of the proceeds of rates struck by the councils in the exercise of their power to issue local rules, of money subscribed with the approval of the District Agents by the inhabitants of the council area, or granted by the Resident Commissioners. There is strict control of budgetary estimates and their approval by the District Agents.

The creation of local councils and especially the giving to them of taxation powers is of dubious validity. The breaking off of parts of each Administrative District and the placing of natives in charge of administrative functions<sup>2</sup> involves a curtailment of the powers of the District Agents, who cannot, under the law of delegation of powers, pass on administrative responsibility invested in them by the Protocol. Section 6 of the Joint Regulation, when it refers to the 'responsibility' of the local councils for law and order omits to indicate to whom the responsibility is owed. Are they responsible to the Resident Commissioners? What is meant by a responsibility for the maintenance of law and order? Could the local councils be compelled to maintain law and order, or do other required acts, by a process of mandamus? The power of the local councils in Section 7 to issue local rules offends the whole tenor of the Protocol, which clearly excludes the natives from all legislative and administrative functions, and even requires that the registration of native births, deaths and marriages be performed by dependants of one or other of the Condomini.<sup>3</sup> The grant of power to the local councils to raise revenue offends the intention of the Protocol to leave the taxing competence with the Resident Commissioners. Also, the Protocol excludes the natives from electing municipalities, which is what the local councils in essence are. Resort may, however, be had to

<sup>1</sup> Joint Regulation No. 4 of 1959.

<sup>2</sup> Joint Regulation No. 9 of 1957, s. 3.

<sup>3</sup> This function has now become a Condominium one by exchange of Notes of 15 February 1967: Cmnd. 3276.

the Instructions to the High Commissioners, which are legislatively imported into the Constitution, and which enable the Joint Court to ascertain the intentions of the framers of the Protocol. These refer to the policy of gradually raising the material prosperity of the natives, and perhaps justify the contention that a power over the tribes, or *en ce qui concerne* them, should be construed as a power to create local bodies of administrative character, even if these are intended as substitutes for the tribes.

The High Commissioners and Resident Commissioners are commanded by Article VIII (4) of the Protocol to 'cause a collection of native laws and customs to be made', and these, where not contrary to the dictates of humanity and the maintenance of order, 'should be utilised for the preparation of a code of native law, both civil and penal'. But the native criminal code formulated in 1927<sup>1</sup> gives no indication that a collection of native laws had been made or even that native custom has been considered. The code was re-enacted in a more modern form in 1962,<sup>2</sup> but again it does not indicate that anything other than French and English jurisprudence has been included.

In 1951 the Joint Court laid down rules of procedure to be followed in native courts in civil and commercial matters entertained by them. Useful as it is to have these rules of civil procedure they are pointless when there is no native civil law.<sup>3</sup> To say that native customary law will regulate native commercial and civil dealings is simply unrealistic because, although within the tribe there was worked out an efficient civil and commercial custom, it was essentially local and referred only to primitive tribal needs. In the Condominium there is no provision for actions of tort or contract between natives; they may not form companies;<sup>4</sup> they are not able to register a boat (and since several local councils are acquiring large motor launches this is becoming something of a problem which would not have been present when fishing and water transport were entirely by canoe); natives may not vote (originally this was to ensure the political indifference of the Condomini towards the natives); and until 1967<sup>5</sup> there was no provision to register births, marriages and deaths among natives, although Article IX of the Protocol provided for any declaration natives might wish to make regarding births, marriages and deaths simply for the purpose of acquiring civil status. This is in fact the only reference made in the Protocol to the civil status of the natives.<sup>6</sup>

<sup>1</sup> Joint Regulation No. 6 of 1927.

<sup>2</sup> Joint Regulation No. 12 of 1962.

<sup>3</sup> In civil litigation between a native and a non-native the law of the nation of whom the non-native is a dependant applies.

<sup>4</sup> Though Joint Regulation No. 9 of 1951 made provision for native co-operatives, and Joint Regulation No. 11 of 1962 purports to incorporate these upon registration.

<sup>5</sup> Exchange of Notes of 15 February 1967: Cmnd. 3276.

<sup>6</sup> By Exchange of Notes of 17 April 1963 the Protocol was amended to authorize legislation respecting liquor offences: Cmnd. 2054. These offences were created by Joint Regulations Nos. 13 and 17 of 1963. See The New Hebrides Order, s.1. No. 1324 of 1963.

## LOCAL CONSULTATIVE INSTITUTIONS

Until the late 1950s the administration of the New Hebrides was entirely paternalistic in character, and there was no attempt to consult local interests, whether European or New Hebridean. The Protocol<sup>1</sup> envisaged the creation of local municipalities empowered to pass an annual budget, vote local taxation, initiate and carry out municipal works, establish schools and institutions and take all measures necessary for the welfare of the local community. In 1909 a Joint Regulation was made, inspired by the French municipal law of 1884, providing for incorporation of municipalities. Although this has not been repealed, in fact it is a dead letter. In 1902 two municipalities had been created in embryonic form by the French settlers at Franceville (now Port Vila) and Faureville (now Mélé). They had also in the following year set up machinery through the *Syndicat Agricole Français* to issue postage stamps. The municipality at Faureville functioned until 1909, a little longer than at Franceville, but both were suppressed by the Condominium administration as incompatible with the exercise of a central authority.<sup>2</sup>

An Advisory Council was established at Vila<sup>3</sup> in 1957 and another at Santo in 1966.<sup>4</sup> The former consists of two co-presidents, who are the Resident Commissioners or their deputies, two heads of department appointed by decision of the Resident Commissioners, and twenty unofficial members, twelve of whom (six from each jurisdiction) are appointed by the Resident Commissioners from among the inhabitants of the New Hebrides, and eight of whom are elected. Four of the elected members are elected by the Electoral College of the Chamber of Commerce, and four are New Hebrideans, elected by an electoral body made up of members elected by District Councils who have operating budgets. The Resident Commissioners alternate in the chairmanship of meetings. The functions of the Council are solely advisory, and submission of matters to the Council for advice are at the discretion of the Resident Commissioners. No meeting may be held unless the two co-presidents are present, so that neither administration can offend the constitutional principle of equality. The Council meets at least once a year according to an agenda prepared by the Resident Commissioners, and officers of the national administrations may be invited to attend as advisers. If five members so request, consideration of any matter is postponed for not less than forty-eight hours. The Resident Commissioners may at their discretion limit discussion on any item

<sup>1</sup> Art. LXII.

<sup>2</sup> *Journal de la société des océanistes*, 12 (1956), p. 26.

<sup>3</sup> Joint Regulation No. 5 of 1957; amended by Joint Regulation No. 7 of 1958.

<sup>4</sup> Joint Regulation No. 16 of 1966.



of the agenda, including financial items. The British administration would like the Council to evolve into a legislative Council, and eventually into a responsible Assembly; and it makes no secret of working towards that end. The first step, it proposes, should be to lay all draft Joint Regulations before the Council for 'advice', in the hope that 'advice' will tend to become 'consent'. The French are lukewarm about the idea and prefer the Council to remain what it now is, a forum for criticism about detail and not principle, and a body deprived of all real capacity for work because it meets so rarely. Although the Protocol expressly excludes the natives from voting in municipal elections,<sup>1</sup> the Joint Regulation creating the Advisory Council at Santo authorizes them to vote.

If the momentum behind the Advisory Council is British, that behind the Chamber of Commerce is French. The institution is a French idea: in France a Chamber of Commerce is a profit-making public enterprise which constructs utilities, such as wharves, and operates them. It bears little resemblance to the English institution of the same name, which is a private body existing to sponsor commercial contacts, financed by subscriptions. The Joint Regulations which established the Chamber of Commerce in 1961 stated that it 'shall be a corporate body',<sup>2</sup> though it is doubtful whether the Condominium has power to incorporate in this fashion. The Chamber consists of twenty members, of whom eight are elected by group Electoral Colleges, and twelve nominated by the Resident Commissioners; and is divided into two sections, one representing agricultural, and the other commercial and industrial interests; and each section reflects the preponderance of British and French private interests. The Chamber advises the Resident Commissioners, provides them with information on agricultural, commercial and industrial matters affecting the territory, recommends measures for increasing its potential and undertakes works of economic interest. Its powers to operate public utilities are wide, and it is intended to be a profit-making organization, whose surplus of revenue over expenditure is to be invested in the Territory. The Resident Commissioners control the Chamber's funds, and authorize the raising of loans and their servicing.

#### LAND JURISDICTION

Competition of their nationals for land was the reason why Great Britain and France were moved to establish a 'joint sphere of influence' in the New Hebrides in the first place. Not surprisingly, the Convention, and later the Protocol, was preoccupied with devices for minimizing national

<sup>1</sup> Art. LXIV.

<sup>2</sup> Joint Regulation No. 14 of 1962.

conflict in the grab for land. The Joint Court was given an elaborate jurisdiction to confer title on claimants and to adjudicate between rival titles. At an early stage the Torrens system of land registration was imported, and with it the advantages—and the inflexibility too—of the doctrine of indefeasibility (the doctrine that the registered owner has a title which may not be attacked). An indefeasible title presupposes that the boundary of the land has been determined; but until the land is surveyed this delimitation is impossible. From the outset the Joint Court's work in settling the land question was frustrated by a lack of surveyors and a financial stringency which made it impossible to enlarge the survey teams, or even to transport to some of the remoter islands the surveyors actually employed. Only in the last few years has it been possible to deal with the bulk of land claims which had been outstanding since 1913, and, needless to say, the grant of indefeasible titles to some claimants has involved the dispossession of others, who, for many years while the Joint Court was necessarily inactive, had continued to hold on to disputed lands.<sup>1</sup>

Non-native claimants to immovable property are required by the Protocol to establish their rights before the Joint Court, as a preliminary to registration in their name.<sup>2</sup> In land suits between natives the 'general principles of law' are to be applied,<sup>3</sup> because there is no coherent native land law. In suits involving natives and non-natives, the law applied is that of the Power of which the non-native is a dependant.<sup>4</sup> However, sloppy draftsmanship of the Protocol has raised a jurisdictional conundrum. Article XII gives the Joint Court jurisdiction over all proceedings in respect of rights over immovable property. Article XIII specifies the law applying in actions concerning immovable property as that laid down in the Convention (*sic*, not Protocol); Article XXIII refers to the law applied by the Joint Court when no question arises as to the original land transaction as that of the proper law of the contract, or the law of the Power of which the defendant is a dependant; and Article XXVI (9) says that Article XXIII shall be applied by the national courts having jurisdiction to rights

<sup>1</sup> In the New Hebrides there has been a tangle of land claims, and the effect of registration is to cancel all previous rights, no matter how well founded. This is the effect of the *Cour de Cassation* decision on registration in the analogous Moroccan legislation: Decision of 17 April 1956, *Revue juridique et politique de l'Union française* (1956), p. 803. The latest British decision on registration is *Frazer v. Walker*, [1967] 1 A.C. 569.

<sup>2</sup> Art. XXII. Art. XXIV provides that where land has been cultivated bona fide on the strength of a title which is found to be defective, the title may be confirmed on payment of compensation. But, of course, this adjustment is not possible after the title has been issued.

<sup>3</sup> Art. XXI.

<sup>4</sup> Arts. XIII, XXI, XXIII. Art. XXVI (9) says that the provisions of Art. XXIII (1) shall be applied by the national courts 'having jurisdiction to rights affecting registered immovables'. This implies an exclusion of jurisdiction created elsewhere, e.g. Art. XII. Art. XII (1) (a) refers to 'rights over'. Art. XXVI (9) refers to 'rights affecting'. The distinction is tenuous, but proceedings to recover arrears of rent might be a claim in respect of 'rights affecting', but not necessarily in respect of 'rights over'.

affecting registered immovables, and specifies the law to be applied in cases between natives and non-natives as that of the Power of which the non-native is a dependant. Does this give jurisdiction in land matters to the national courts co-ordinate with that of the Joint Court? Or does it merely confirm that once land is registered it is subject to the jurisdiction of the national courts?

The problem of determining the law which governs these institutions has been largely ignored in practice, and perhaps it is insuperable. Either the *lex situs* or the *lex fori* in all systems of the conflict of laws determines the legal incidences of immovables when characterized as such. The *lex fori* in the New Hebrides is no more than the Protocol, which merely directs<sup>1</sup> that the law to be applied in suits in the national courts affecting immovables shall be the law of the Power of which the defendant is a dependant; but English and French law immediately refer the question to the *lex situs*, which is non-existent. The only solution to the difficulty is to interpret the Protocol as importing the law respecting property of the Power of which the defendant is a dependant. But this means that the same piece of land, and the institutions attached to it, may be subject in one piece of litigation to English law, and the next to French law, depending on the accident of the defendant's real or opted jurisdiction. How can an English lease be governed by French law, or a French *hypothèque* by English law? The Joint Court has avoided this difficulty by characterizing leaseholds and mortgages as contracts, importing thereby under Article XXIII of the Protocol the proper law of the contract as the governing law. For example, a case involving two French *ressortissants*, who were each the assignees of respective interests under a leasehold created by contract between two British subjects, was referred to the British national court in 1963, and decided according to English law. This practice, if necessary to make the system work at all, does violence to legal theory. Leaseholds, and the French equivalents, are each governed in the English and French conflict of laws by the *lex situs*, not by the proper law of the contract. Mortgages in the common law are rights *in re*, and are also governed by the *lex situs*. The French *hypothèque* is omitted from the catalogue of *droits réels* in Article 526 of the *Code Civil*, and this has raised doubts about its classification as an immovable, but the current French opinion is that it also is governed by the *lex situs*. Of course the debt secured by mortgage is a movable, and governed in English law by the law of the domicile, and in French law by the law of the nationality. There may be good reason for applying to the debt relationship the proper law of the contract, but the effect of doing so would apparently be to treat mortgages and *hypothèques* as purely personal obligations, and not as involving an interest in land. This may be consistent

<sup>1</sup> Art. XXIII (1).



with the theory underlying the Torrens system, but more than a law of registration would be necessary to make the encumbrance legally effective, in the sense, for example, that default could be an occasion of forced sale.

The Joint Court is directed by the Protocol to pay due regard to the interests of the native populations, as well as to those of the non-native purchasers whose bad faith has not been established. In other words, an equality of interest is embodied in the Protocol between native and non-native rights in land, and the Court is not entitled to accord paramount consideration to either party. It is authorized, whenever it considers it necessary, to assign reserves of land to native claimants in proportion to their requirements, and it may grant rights of way to and from the reserved land across the land granted to a non-native. The Court relies on the surveyors' reports, and on the arguments of the native advocate whose knowledge of the problem and devotion to the interests of the natives are both universally acknowledged. Only once since 1960 has the Court had the benefit of a report of a District Agent.

#### CONCLUSION

The problem of decolonization in the Pacific is intractable, and its intractability is best illustrated by the New Hebrides. Economically this Group is not the worst off in the Pacific by far. Its islands are relatively large and productive; it occupies one of the favoured geographical situations in the Pacific, with important trade and air routes intersecting at Port Vila; and it is capable of becoming something of a metropolis of the Western Pacific. But close examination of the problem of its ultimate disposal induces only despair. Every conceivable obstacle to political, social and economic advancement that the Pacific situation generates emerges in sharp relief in the case of the New Hebrides. A Condominium may be easy to establish, but it is extraordinarily difficult to dismantle, and the persistent effects of a Condominial administration in the legal system, the social structure and the intellectual environment will be traced long after a final decision on the fate of the territory has been made. The observer who wrestles with the recalcitrant problems of the New Hebrides cannot fail to shed some illumination on the problems of the Pacific as a whole; and the main lesson that emerges from a study of the New Hebrides is that any solution which may be propounded for the Pacific when the United Nations becomes particularly energetic about this region is liable to be excessively facile.<sup>1</sup>

The British administration in the Condominium regards United Nations intervention as only a question of time, and in theory, at least,

<sup>1</sup> The New Hebrides was discussed by the Committee of Twenty-four in the week 12-19 October 1964.

would probably welcome it, provided it does not impose such pressure that the work of self-development of the indigenous population would be interrupted. This corresponds with the view of Whitehall that self-determination is the ultimate principle in colonial administration. The British Government has long entertained the philosophy that dependent territories should be administered for the benefit of the population,<sup>1</sup> whose culture and institutions should be respected whenever they do not conflict with the programme of self-reliance, and should be suppressed when they do. Colonial administration has thus assumed in the British tradition a paternalistic character. Emphasis has been thrust on able administration at the technical level and on education; but education has not been aimed at the spread of what might be called a 'British culture' so much as on training in the institutions of modern society and the techniques of making them function. The minds of the people in British territories have not been affected to such an extent as the minds of those in the French territories have been affected; ideas have been transported, but not an integrated way of life. This philosophy is reflected in the practical policies of the British administration in the New Hebrides, which in the past ten years has worked hard to overcome the effects of two generations of political and social stagnation.

The French administration in the New Hebrides pursues a quite different aim, which reflects the political aims and the social philosophy of France.<sup>2</sup> In the first place, the French colonial tradition has been much less paternalistic than the British, even if it has at the same time been less technically efficient. The ultimate aim has been to extend *la civilisation française* as one of mankind's blessings, and the French achievement in this respect has been remarkable. From 1914 until the Fifth Republic this policy was rarely articulated because the self-consciousness of a France in eclipse made it embarrassing. Contemporary France has no such inhibitions, and in those territories still left to her the programme of Gallicizing is daily being intensified. In the New Hebrides the great majority of Europeans are French, but owing to the historical accident that the Presbyterian missionaries beat the Catholic missionaries into the field by a generation, only a minority of the indigenous population has succumbed to French attraction.<sup>3</sup>

<sup>1</sup> Lindley, *Acquisition and Government of Backward Territory* (1924), p. 331.

<sup>2</sup> Betts, *Assimilation and Association in French Colonial Theory* (1961). Levy, Lacam and Roth, *French Interests and Policies in the Far East* (1941), pp. 47, 60; 'Les Nouvelles-Hébrides', in *Resonances, Revue de comité d'expansion culturelle de la France d'outre-mer* (1957), p. 18; *Résidence de France. Note documentaire sur les Nouvelles-Hébrides* (1951). The section on the New Hebrides in Bourgeau, *La France du Pacifique* (1955) is informative and not polemical. Also Gayet, 'Le cinquantenaire du Condominium des Nouvelles-Hébrides,' *Revue . . . de la France d'outre-mer* (September-October 1956), p. 78.

<sup>3</sup> There is no secret about the French philosophy of colonial government. A leading textbook on the constitutional law of the French overseas system expounds it as follows: 'La domination

The French administration in the New Hebrides has held the initiative, mainly because French economic interest in the Group has been predominant, and at times it has gained over the British administration a psychological ascendancy as well. The workings of the Condominial institutions reflect the respective British and French colonial philosophies: the British view prevails where, as in the case of the fairly innocuous Advisory Councils, the French have no objection to co-operation; the French view prevails where, as in the case of the Chamber of Commerce, the French have forced their policy on the British.

The French intend to stay in the Pacific, and they intend to stay in the New Hebrides. The solution of independence they do not accept, though they do accept a solution of decolonization such as they claim to have achieved for French Oceania in the *Communauté française*. The New Hebrides is mainly a matter of French economic interest; its ties with New Caledonia and the New Caledonian economy are considerable. If there is to be a political solution to the New Hebridean problem, and the Pacific problem generally, then it should in French eyes involve the integration of the New Hebrides with New Caledonia. This is not easy to achieve economically, for the wage-rates in New Caledonia would bankrupt the New Hebrides overnight; but economic difficulties, the French believe, can always be overcome by cultural and political affinity. There is a further point, and that is that if the French permitted themselves to be hustled out of the New Hebrides this would be a dangerous precedent for other French Pacific interests.

The French planters in the New Hebrides are the last to want the Condominium terminated. While the two administrations compete, they say, they are left alone. The political inertia which has characterized the New Hebrides, and which the British and French administrations are both trying in different ways to combat, derives from the feeling among the European businessmen and the European missionaries that their interests are best preserved by the *status quo*; and it is a feeling that the missionaries

est d'abord économique. . . . La domination est également culturelle. La métropole impose sa civilisation, jugée supérieure à celle des pays d'outre-mer. D'où le mépris des langues nationales ou vernaculaires, l'introduction du système d'enseignement métropolitain. Sur le plan religieux, le missionnaire chrétien accompagne le soldat et l'administrateur. Il est la bonne conscience de l'homme d'affaires. Il justifie la colonisation sur le plan moral'; Gonidec, *Droit d'outre-mer* (1959), vol. 1, p. 10. Nor is there any secret about the French design to bring the New Hebrides more and more within the attraction of France. In 1964 the French *Ministre des Anciens Combattants et Victimes de Guerre* visited the New Hebrides. In his address of welcome the French Resident Commissioner said: 'En ce qui concerne plus spécialement les ressortissants français, vous pourrez, Monsieur le Ministre, assurer le Général de Gaulle que les Nouvelles-Hébrides, terre de fidélité et qui, à plusieurs reprises, lorsqu'il l'a demandé à la Nation, lui ont apporté un soutien massif et sans partage, restent profondément attachées à la Mère Patrie, . . .'. The Minister replied, and in conclusion declared: 'Vivent les Nouvelles-Hébrides, Vive le Général de Gaulle, Vive la France.' *Bulletin d'information de la résidence de France* (22 May 1964), p. 10.



have communicated to the indigenous population, which to a very great extent is under their influence. That the *status quo* will be preserved for a long time seems a reasonable prediction when one examines the combination of forces exerting themselves to this end. As yet there is no serious talk of independence among the indigenous population, very few of whom are of sufficient educational standard to feel the urge to achieve it, and almost all of whom are of that amiable disposition which makes political ambition among the Melanesian peoples something of an anachronism.

Paradoxically, at a moment in history when British and French policies with respect to the future of the New Hebrides are probably at their most divergent, co-operation at the administrative level is probably at its highest. Some time ago personal relationships between the two administrations were bad. This state of affairs has greatly altered, but an important lesson is to be drawn, and that is that the impossible constitutional framework under which government of the Condominium is obliged to function can only work while there is personal harmony among those who are required to govern. If personal disharmony were added to the evolving political contradictions, effective government could be brought to a halt, and diplomatic controversy over the New Hebrides would add to the international complications which already exist in Anglo-French relations.

When a constitution becomes unworkable the obvious thing to do is change it. In the case of a Condominium this is easier said than done. The process of change is that of diplomatic negotiation, which is inherently slow. Proposals originating with the British administration must pass through the Solomon Islands to the Foreign Office, to the British Embassy in Paris, to the Quai d'Orsay, to the *Ministère d'État chargé des départements et territoires d'outre-mer*, to the Prime Minister's office, back through the ministries to the French Embassy in London and the Foreign Office. At every point there is delay. More important matters arise which cause consideration to be shelved. In 1954 the two administrations in the Condominium began work on a new constitution, and had action been taken at any time up to 1961 it would have been possible to bring this into operation. Now the chance may have gone, for the French Government appears to take the view that any new *acte colonial* would attract the scrutiny of the Committee of Twenty-Four of the United Nations.

This does not mean that important constitutional improvements cannot be effected easily and without diplomatic complications. The Protocol of 1914 has already been amended in some technical respects by exchanges of Notes, and it has been agreed that the whole section on labour law in the Protocol should be struck out. This section was designed to remedy the long-forgotten evils of recruitment for plantation work, and it contained disciplinary provisions that are no longer in effect. Also, a very simple

formula of government, with a grant of plenary legislative powers, would, if followed by a proper set of legal enactments, solve in an instant the problem of the legal disabilities of the New Hebrideans.

The Protocol as a whole, even if technically improved, must be made to work, and yet it is a fundamentally unworkable document. Literal interpretation of its provisions could invalidate most acts ever performed by the Condominium government, and bring administration to a halt. Any number of weapons in either English law or French law are available to slaughter the legislation of the Condominium. Some of this legislation has in the past been so carelessly drafted, and some of the formalities disregarded to such an extent, that it has deserved this fate. But the basic constitution must be salvaged. Herein lies the real importance in international law of a study of the New Hebrides: it projects insights into the classical problems of sovereignty, jurisdiction and territory that are never permitted to arise except theoretically in the case of normally organized States; and these insights are gained only as one struggles to reconcile political and diplomatic reality with the exigencies of juristic logic; as one works, in effect, to bring order, coherence and discipline into a ramshackle constitution.<sup>1</sup>

<sup>1</sup> On 15 July 1965 it was announced in the House of Commons that talks had occurred with the French Government and a list of specific subjects for further detailed joint examination, both locally and at the metropolitan level, had been drawn up, including labour legislation, land tenure and the co-ordination of French and British development plans in the Condominium. 'I hope that these studies will result in practical measures of reform which will further the progress of the territory': *Hansard*, H.C., vol. 716, Written Answers, col. 90, 15 July 1965. For progress see *ibid.*, vol. 728, Written Answers, col. 300; vol. 735, Written Answers, cols. 63, 259; vol. 738, col. 1162, 1163, where the enactment of a land code was under discussion. Nothing has yet been agreed upon.





# THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES AND THE INTERPRETATION OF THE FISCAL PROVISIONS OF THE ROME TREATY\*

By DR. J. M. HOSTERT

THE European Economic Community is intended to achieve its objectives, consisting in a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer political relations between its Members, mainly through the establishment of a common market.<sup>1</sup> In accordance with this idea, the national markets of the six States which are parties to the Treaty establishing the European Economic Community or E.E.C., signed at Rome on 25 March 1957—Belgium, France, Germany, Italy, Luxembourg and the Netherlands—are to be merged into one all-embracing economic territory. Internal obstacles to the free exchange of goods and services must be removed, conditions concerning the exercise of economic activities are to be approximated, and after a period of increasing integration the common market should appear as a single unit in its relations with third parties.

The programme concerning the liberation of exchanges was described as follows by advocate-general Lagrange:

Everybody knows that the common market is much more indeed than a customs union, but it is *in the first place* a customs union; therefore the establishment of the common market should include among its first accomplishments the suppression of customs tariffs between Member States as well as the setting up of a common external customs tariff and, on the other hand, the elimination of quantitative restrictions between Member States, generally referred to as quotas.<sup>2</sup>

The customs union became fully effective on 1 July 1968, eighteen months ahead of the schedule laid down in the E.E.C. Treaty, when the last customs duties existing between the six States were repealed.<sup>3</sup> They amounted to 15 per cent of those in force ten years earlier. On the same day

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<sup>1</sup> Article 2 of the Treaty establishing the European Economic Community (E.E.C.), signed at Rome on 25 March 1957, *Mémorial du Grand-Duché de Luxembourg* (1957), pp. 1415 et seq. (hereinafter cited as *Mémorial*). *U.N. Treaty Series*, vol. 294, pp. 17 et seq. Pierre Pescatore, 'La notion de marché commun dans les traités instituant l'Union économique belgo-luxembourgeoise, le Benelux et les Communautés européennes', *En hommage à Victor Gothor* (1962), pp. 497-546.

<sup>2</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. 7, p. 663.

<sup>3</sup> *De l'union douanière à l'union économique: l'étape du 1er juillet 1968*, document No. 47 (May 1968) *Bureau d'information des Communautés européennes* (Paris).

the four different customs tariffs applying to exchanges with third States—there were only four because the Benelux countries already enforced one single tariff<sup>1</sup>—were fully replaced by the common external customs tariff laid down in accordance with the agreements reached in 1967 in Geneva as a conclusion to the Kennedy Round negotiations. Quantitative restrictions to intra-Community trade in industrial products had been abolished almost completely as early as 1961, and with regard to agricultural products, between 1966 and 1968 when the various European marketing organizations concerning these products came into force. The European Economic Community is a customs union as defined in Article XXIV, paragraph 8, of the General Agreement on Tariffs and Trade.

Hindrances of a different kind subsisted within the Community even after 1 July 1968. It is generally accepted in international trade that goods are subject to indirect taxes such as turnover charges—or excises, which are a particular kind of turnover charges—in the country of destination, but not in the country of origin. Accordingly the country of destination raises a compensating duty on imports which is intended to offset the exemption from indirect taxation granted in the country of origin. This rule, called the ‘destination’ principle as opposed to a possible ‘origin’ principle holds also under the Rome Treaty. In the absence of a uniform indirect tax burden in the six member States there remains a ‘tax barrier’ even after the elimination of customs duties and quantitative restrictions. Compensating duties are not necessarily in contradiction with the establishment of the common market provided they only offset the advantages derived from exemption in the country of origin, and they do not afford protection to the industries of the importing State. On these conditions they do not infringe the fundamental principle of the common market, which is that discriminations made on the basis of nationality are inadmissible.<sup>2</sup> Yet the ‘tax frontier’ as it exists is hardly favourable to the exchange of goods.

States associated by economic agreement have always had to face the issue of the tax barrier. The fiscal provisions of the Rome Treaty therefore deal with a problem which is classic as to its substance; they do so, however, in a new institutional context.

## PART I: THE CLASSIC PROBLEM

The European Economic Community is no obstacle to the completion of regional unions between Belgium and Luxembourg, and between Belgium, Luxembourg and the Netherlands in so far as their objectives are not achieved by application of the Rome Treaty.<sup>3</sup> In other words, these unions are justified provided they are ahead of the common market in the field of

<sup>1</sup> E.E.C. Treaty, Article 19.

<sup>2</sup> *Ibid.*, Article 7.

<sup>3</sup> *Ibid.*, Article 233.

economic integration. Furthermore the European Economic Community does not affect the earlier European Coal and Steel Community in regard to the rights and obligations of the member States, the powers of the institutions of the Community and the rules for the functioning of the common market for coal and steel.<sup>1</sup> It is therefore necessary to consider shortly the tax barriers within these different unions.

### *The Belgo-Luxembourg Economic Union*<sup>2</sup>

The Economic Union between Belgium and Luxembourg, referred to as the *Union économique belgo-luxembourgeoise*, or usually in abbreviation as the U.E.B.L., was established by a convention signed on 25 July 1921 and ratified on 6 March 1922.<sup>3</sup> The most recent version of this international instrument incorporating the subsequent amendments is provided by the Consolidated Convention establishing the Belgo-Luxembourg Economic Union, which goes back to 1965.<sup>4</sup> Within the Union a difference is made between excises on the one side and general sales or turnover taxes on the other.

The two States have common excises ruled by a common legislation. The proceeds of these duties are pooled and distributed on the basis of the normal population. In the trade between Belgium and Luxembourg it would not therefore make sense to exempt exports and to raise a compensating duty on imports. An important exception to this rule is, however, excises on alcohol which are not pooled but distributed between the two States on a basis much more favourable to Luxembourg.<sup>5</sup>

The original convention of 1921 made no mention of sales or turnover taxes because these charges were unknown both in Belgium and in Luxembourg at the time of the signature. Yet in the very first months following the signature both partners introduced the turnover tax into their fiscal systems. In the two countries this tax was to be raised not only on home dealings but also on imports, including those originating from the other member of the Union. These laws have been amended since but they still hold in their essential principles. The Belgian law of 28 August 1921<sup>6</sup> was followed in time by the Luxembourg law of 21 July 1922<sup>7</sup> whose article 11 (9) authorizes

<sup>1</sup> Ibid., Article 232.

<sup>2</sup> J. Meade, 'The Belgium-Luxembourg Economic Union, 1921-1939', *Case Studies in European Economic Union* (1962); Pierre Pescatore, 'L'Union économique belgo-luxembourgeoise: expériences et perspectives d'avenir' (with appended documents), *Chronique de politique étrangère* (1965), pp. 367 et seq.

<sup>3</sup> *Mémorial* (1922), pp. 217 et seq.; *League of Nations Treaty Series*, vol. IX, pp. 223 et seq.

<sup>4</sup> *Mémorial* (1965-A), pp. 743 et seq.

<sup>5</sup> *Convention établissant entre la Belgique et le Grand-Duché de Luxembourg une communauté spéciale de recettes en ce qui concerne les droits d'accise perçus sur les alcools*, signed in Brussels on 23 May 1935, *Chronique de politique étrangère* (1965), pp. 406 et seq.

<sup>6</sup> *Pasinomie belge* (1921), pp. 584 et seq.

<sup>7</sup> *Mémorial* (1922), pp. 905 et seq.



the government to conclude a convention with Belgium in order to abolish the tax on imports introduced 'by the present law, and by the Belgian law of 28 August 1921'. Negotiations were started but not successfully concluded. Certain anomalies in the assessment of the tax were abolished through a Protocol Relative to the Turnover Tax and the Sales Tax, signed on 23 May 1935.<sup>1</sup> The anomalies in question were the following. Commodities supplied by Belgian firms to their subsidiaries in Luxembourg had been subject to import and sales tax; Luxembourg flour and fertilizer had been exempted from the sales tax whereas similar goods imported from Belgium paid the import tax. Belgian metal products incorporated in export goods had been exempted from the Belgian turnover tax, but that was not true as far as similar Luxembourg products were concerned. Foreign goods sold to Belgian public authorities had been subject to the turnover tax and no exception had been made for Luxembourg goods. These anomalies had in fact been discriminations made on the grounds of nationality between citizens of the Union.

This Protocol and the enactment of the above-mentioned legislation show that both governments alike considered that their States' competence to raise indirect taxes had not been restricted by the establishment of the economic union. They deemed these taxes compatible with the 'full and entire liberty of commerce, without hindrances nor import, export or transit prohibitions, and without levy of duties of any kind' which existed between the partners of the Union.<sup>2</sup> Provided that these taxes were not raised in a discriminatory manner, their rates might be—and in fact were—different in Belgium and in Luxembourg.

In *Ministère public v. Brandenburger*,<sup>3</sup> the Luxembourg High Court of Justice had to decide whether the Luxembourg import tax—a turnover tax raised on imports—was compatible with the convention of 1921. Brandenburger had refused to pay import tax on coffee bought in Belgium and his refusal to pay had been upheld on the ground that this tax was not compatible with the convention, in conformity with the constant line of Luxembourg tribunals that international law must prevail even over subsequent municipal law. The normal legal remedies being exhausted, the Attorney-General instituted the extraordinary procedure of *cassation dans l'intérêt de la loi* which permits the highest court to review the application of the law. In the opinion of the judges the import tax was neither a customs nor an excise duty but a tax on consumption, comparable to the Belgian turnover tax. Charges of this kind did not discriminate against imports originating from the other Member of the Union. They only offset

<sup>1</sup> Unpublished.

<sup>2</sup> Article 3 of the Convention of 25 July 1921.

<sup>3</sup> Judgment of 19 November 1959, *Journal des tribunaux* (1960), pp. 100 et seq., with submissions of Attorney-General Félix Welter.

the advantage gained by the exemption from turnover tax in the country of origin, and were fully compatible with the Union. In his submissions the Attorney-General had rightly pointed out that Luxembourg adopts Belgian customs and excise legislation as the common legislation of the Union. Belgium had introduced the turnover tax before Luxembourg. If the Belgian Government had considered this tax to be a customs duty when raised on imported goods it should logically have put pressure on the Luxembourg Government to introduce in its turn the sales and import tax, and to agree to the pooling of the revenue. The Belgian Government had not, however, acted in this way. Under the Union, it cannot therefore be questioned that an import tax is different from a customs duty. This issue was much discussed within the common market.

The principles laid down in the *Brandenburger* case have since been confirmed by Article 26 of the Consolidated Convention which tacitly admits the right of the High Contracting Parties to raise sales or turnover taxes. It provides also that these Parties shall take measures in order to eliminate 'hindrances to the free circulation of goods and services, infringements on the normal play of competition and the effects of the cumulation of taxes between the two countries' in the application of the mentioned tax legislation.

### *The Benelux*<sup>1</sup>

This regional Union, whose existence within the common market is recognized by the Rome Treaty itself, has been set up by a number of successive treaties the earliest of which goes back to 1944. These instruments were consolidated by the Treaty establishing the Benelux Economic Union—referred to as the Union Treaty—signed at The Hague on 3 February 1958, which became effective on 1 November 1960.<sup>2</sup> With regard to intra-Benelux exchanges this Treaty makes a difference between excises and the other turnover taxes.

According to Article 3 of the Union Treaty no excises may be raised on the circulation of goods between the territories of the High Contracting Parties. Goods originating from one of the Benelux States are to be given national treatment in the others. In fact, as early as 18 February 1950 the three States had signed, and subsequently ratified, a convention<sup>3</sup> abolishing

<sup>1</sup> J. Meade and S. J. Wells, 'The Building of Benelux', *Case Studies in European Economic Union*, (1962), pp. 59 et seq.; M. d'Haeze, *L'Unification des fiscalités en Benelux* (speech made at the XIII<sup>e</sup> Congrès économique Benelux, Rotterdam, 17-18 April 1959), unpublished; *Le Benelux commenté* (i.e. the most important instruments and official documents relating to the Benelux), collected and published by Jacques Karelle and Fritz de Kemmeter (Brussels, 1961).

<sup>2</sup> *Mémorial* (1960), pp. 1215 et seq.; *U.N. Treaty Series*, vol. 381, pp. 165 et seq.

<sup>3</sup> *Convention portant unification des droits d'accise et de la rétribution pour la garantie des ouvrages en métaux précieux entre le Royaume de Belgique, le Grand-Duché de Luxembourg et le Royaume des Pays-Bas*, signed at The Hague on 18 February 1950, *Mémorial* (1951), pp. 1195 et seq.

certain excise duties which had existed before in Holland, in Belgium or in the U.E.B.L. The same instrument created common excises on all goods which really mattered for the States' revenues like spirits, sugar, beer, wine, tobacco and petrol. Within the Benelux these duties were to be collected by the country of origin but transferred to the country of destination.<sup>1</sup> A common legislation concerning the collection of these common excise duties was to be enacted. Article 80 of the Union Treaty of 1958 repeated the Convention of 1950 because it provided again for the establishment of common excise rates, and yet the only excise duty which had in fact been unified on 1 January 1969 was the duty on wine. Moreover, a Convention between Belgium, the Grand Duchy of Luxembourg and the Netherlands, relative to Co-operation in the Field of Customs and Excises, had been signed on 5 September 1952, and became effective on 1 July 1956.<sup>2</sup> It provided for mutual recognition of documents and for exchange of information; it also authorized officials of one Benelux country under certain conditions to carry out their functions in another Benelux country. No action affecting the main revenue-yielding products like tobacco, petrol, beer or spirits, had been taken. And yet it had been claimed that the Benelux States should progress beyond the 1950 convention, that they should pool the revenue of the common rates and distribute it in a proportion agreed upon in advance.

The situation is hardly better as regards turnover taxes in general (called *omzetbelasting* in the Netherlands, *taxe de transmission* in Belgium and *impôt sur le chiffre d'affaires* in Luxembourg). Already in 1950 a Benelux ministerial conference had decided to introduce a common turnover tax system with common rates,<sup>3</sup> but this good intention is not reflected in the Union Treaty of 1958 whose Article 79 provides only for a regime ensuring the free circulation of goods. The destination principle still holds within the Benelux: exports are exempted in the country of origin and subject to tax in the country of destination where they are given national treatment. When the Benelux Union is considered as a whole it is not excluded that these operations compensate each other with the only effect that much administrative work is done in vain. In any case the continued existence of the fiscal barrier is not favourable to the free circulation of goods.

It has therefore been suggested that turnover taxes on imports should not be paid at the common frontier but in the interior of the three member States. With occasional exceptions physical control of goods at the border would be replaced by control of the importers' accounts. Stops at the border

<sup>1</sup> Article 19 of the Convention of 18 February 1950; *U.N. Treaty Series*, vol. 123, pp. 45 et seq.

<sup>2</sup> *Mémorial* (1954), pp. 1528 et seq.; *U.N. Treaty Series*, vol. 247, pp. 329 et seq.

<sup>3</sup> M. d'Haeze, *L'unification des fiscalités en Benelux*, p. 5.



which entail considerable losses for road hauliers could thus be eliminated. Transporters would simply make an oral declaration or even leave an invoice copy at the frontier. This system is not yet, however, in general application.<sup>1</sup>

As a first step in this direction a Convention between Belgium, the Grand Duchy of Luxembourg and the Netherlands, introducing Mutual Assistance in the Collection of Turnover Taxes, Sales Taxes and Similar Taxes, was signed on 25 May 1964 and put into force on 1 December 1966.<sup>2</sup> It provides for mutual recognition of administrative documents and for exchange of information. With the consent of the competent local authorities officials of one of the Benelux States may carry out investigations in another Benelux State.

It is necessary to conclude that the objectives set out in Articles 79 and 80 of the Union Treaty have not been completely achieved. In accordance with the Transitory Convention signed on 3 February 1958 the Benelux Union should have been completely established not later than 1 November 1967.<sup>3</sup> Articles 31 and 32 of the same Transitory Convention authorize the High Contracting Parties to collect excise duties and turnover taxes 'in an autonomous manner', pending the 'elimination of the difficulties' caused by Articles 79 and 80. It was found that the deadline of 1 November 1967 did not apply to the objectives of Articles 79 and 80. This interpretation<sup>4</sup> consecrates the failure of the Benelux States in the elimination of the tax barrier.

### *The European Coal and Steel Community*<sup>5</sup>

The European Coal and Steel Community (E.C.S.C.) is different from the Economic Union between Belgium and Luxembourg, the Benelux and the European Economic Community in as much as it provides only for partial economic integration. Established by a treaty signed in Paris on 18 April 1951 by Belgium, France, Germany, Italy, Luxembourg and the Netherlands,<sup>6</sup> it is founded on a common market for coal and steel products defined in its Appendix I. According to Article 4 of the Paris Treaty,

<sup>1</sup> Document *Union Économique Benelux A* (68) 53, of 19 December 1968, *Possibilité de supprimer les formalités aux frontières intérieures à la suite de l'instauration de la t.v.a.* (unpublished).

<sup>2</sup> *Mémorial* (1966-A), pp. 921 et seq.

<sup>3</sup> The transitory period of the Benelux, which is in most fields five years from the entry in force of the Union Treaty, i.e. from 1 November 1960 onwards, has been extended twice in conformity with Article 37 of the Transitory Convention—*Convention Transitoire*—to a maximum of seven years; the Transitory Convention itself was signed and ratified together with the Union Treaty; *ibid.* (1960), pp. 1232 et seq.; *U.N. Treaty Series*, vol. 381, pp. 214 et seq.

<sup>4</sup> It was given by the Luxembourg Foreign Minister Pierre Gregoire before the *Conseil Interparlementaire Consultatif de Benelux* during its meeting in Luxembourg on 29–30 November 1968; the reference document was not yet available in print at the moment of writing.

<sup>5</sup> H. H. Liesner, 'The European Coal and Steel Community', *Case Studies in European Economic Union* (1962), pp. 195 et seq.; esp. pp. 310 et seq.

<sup>6</sup> *Mémorial*, 1952, pp. 695 et seq.; *U.N. Treaty Series*, vol. 261, pp. 141 et seq.

'import and export duties, or taxes having equivalent effect' and measures making price discriminations between buyers are abolished as 'incompatible with the common market for coal and steel'. Discriminative practices involving sellers who fix different conditions for comparable transactions, especially with regard to the nationality of buyers, are pricing practices incompatible with Article 4 of the E.C.S.C. Treaty. This principle is laid down in Article 60, paragraph 1, of the Treaty.

When the common market became operative the High Authority—an independent body of the highest officers of the E.C.S.C.—inquired into the tax burdens borne by coal and steel products. The over-all amount of duties, it found, varied in the six States; it was, in particular, much higher in France than in Germany. Turnover taxes were raised on each successive sale of commodities; they were therefore multi-stage charges with cumulative effect because no credit was given for taxes paid on earlier dealings. At this moment all turnover taxes with the single exception of the French *taxe à la production* corresponded to this pattern.

The merits of the 'destination' principle which ruled intra-Community coal and steel trade were soon discussed in the so-called tax dispute. German coal was sold cheaper at home than in export markets. This practice was considered as a discrimination of the kind forbidden by Articles 4 and 60 of the E.C.S.C. Treaty. Domestic prices were then raised in Germany. The French buyers had hoped for some rebates at least on export prices and they also feared that German merchants, in the general shortage of coal, might not deduct the turnover tax refunds on exports from the price charged to French customers. In a decision the High Authority laid down that the inclusion in selling prices of taxes refunded to the seller constituted a practice forbidden by Article 60 paragraph 1 of the Treaty.<sup>1</sup> Before being issued the decision had to be submitted to the so-called Consultative Committee where the views of the French and German delegates proved to be irreconcilable. The Germans argued that the whole system of refunding turnover taxes on exports and of raising compensating duties on imports entailed that a given article was sold for different prices in the different countries, even apart from unequal transport costs, and that it therefore created a discrimination. Apart from transport costs, all customers should pay the same price for the same goods, and the origin principle should replace the destination principle.

Realizing the complex nature of the question the High Authority appointed a committee under the chairmanship of Professor Tinbergen<sup>2</sup> and asked it to investigate the economic consequences for the common market

<sup>1</sup> Décision No. 30-53 of 2 May 1953, *Journal officiel de la C.E.C.A.* (1952-4), p. 110.

<sup>2</sup> *Communauté européenne du charbon et de l'acier, Haute Autorité: Rapport sur les problèmes posés par les taxes sur le chiffre d'affaires dans le marché commun établi par la commission d'experts instituée par la Haute Autorité (arrêté no. 1-53 du 5 mars 1953), document 1057-53 H.A.*

for coal and steel (i), of a system providing for export exemptions and compensating import duties, under which goods would support turnover taxes of the country of destination and; alternatively (ii), of a system providing that goods delivered within the common market were subject to turnover taxes of the country of origin.

According to the committee the choice of the system entailed no difference in real terms provided the tax rate was the same for all products within a given country. The relative costs of different commodities in one country, and consequently the distribution of resources, was not affected whether all commodities were exempted from turnover tax or not. Distortions would, however, arise if the origin principle were only applied to coal and steel and if all other products were charged in accordance with the destination principle: in that case the distribution of economic resources would be affected. Countries raising high turnover taxes on coal and steel would artificially be led to concentrate on the production of goods which would not fall under the E.C.S.C. Treaty, and to import coal and steel. The reverse would be true in countries imposing only low charges on coal and steel. A particularly absurd consequence of the partial application of the origin principle would be that end-products outside the scope of the Paris Treaty would be cheaper than their E.C.S.C. raw materials if both were transported from a country with high turnover tax rates into another country with low rates. The Report of the Tinbergen Committee illustrates this point by an example relating to wire, an E.C.S.C. product, and nails made out of wire but not themselves ruled by the E.C.S.C. Treaty. It assumed a case in which nails costed 10 per cent more than wire, and that wire costed 100 units of a given currency in France. Moreover—so ran the hypothesis—the origin principle applied to E.C.S.C. products and the destination principle to all other goods; the French turnover tax rated 20 per cent, the German 7 per cent. French manufacturers sold wire for 120 units in Germany, i.e. 100 (production costs) plus 20 (turnover tax in France, the country of origin) and nails for 118 units, i.e. 110 (production costs) plus 8 (equivalent to 7 per cent compensating tax in Germany). In Germany French nails would therefore be cheaper than French wire.<sup>1</sup> This result would lead to an irrational use of productive resources.

It is the limited use of the principle of origin which creates such distortions. Therefore, this rule could be introduced only under the conditions (i) that it applied to all commodities and (ii) that rates were uniform in all the States. Under the Treaty establishing the European Coal and Steel Community it is of course not possible to apply the origin principle to *all* exchanges between the member States, or to introduce uniform rates.

<sup>1</sup> *Rapport sur les problèmes posés par les taxes sur le chiffre d'affaires dans le marché commun*, etc., p. 26.



For the immediate future the Tinbergen Committee advised the retention of the destination principle. However, only taxes raised on the last sale should be refunded to exporters because the total turnover tax burden cannot be calculated accurately in a cumulative multi-stage system. With this restriction the existing system was allowed to subsist.

*The European Economic Community*

The treaty establishing the European Economic Community consecrates also the generally adopted destination principle. The relevant rules are found in Part Three—‘Policy of the Community’—, Title I—‘Common Rules’—, Chapter 2, which is entitled ‘Fiscal Provisions’.

Article 95 deals with compensating duties raised on imports from other member States. If there are similar domestic products, member States shall not impose, directly or indirectly, on products of other member States any internal charges in excess of those applied directly or indirectly to similar domestic products. As to its substance this first paragraph repeats Article III, paragraph 2, first sentence of the G.A.T.T. If the imported goods are not produced in the importing country, member States shall not impose on products of other member States any internal charges of such a nature as to afford indirect protection to other products. This second paragraph is inspired by Article III, paragraph 2, second sentence of the G.A.T.T. According to paragraph 3 member States shall, not later than at the beginning of the second stage of the common market—by 1 January 1962—eliminate or amend any national provisions which conflict with the above rules.

Article 96 deals with tax exemptions granted on exports to another member State. Drawbacks of internal charges shall not exceed the charges imposed on exported products, whether directly or indirectly.

Article 97 makes special provision for countries which levy turnover taxes calculated by a multi-stage system—which means, for all countries with the exception of France at the moment the Rome Treaty came into force. In the case of internal charges imposed on imported products, or of drawback allowed on exported products, States may establish average rates for specific products or groups of products, provided that there is no infringement of the principles laid down in Articles 95 and 96. The second paragraph of Article 97 gives the Commission the power to issue appropriate directives or decisions to a State whose average rates do not conform with the above-mentioned principles.

According to Article 98, no exemptions shall be granted on exports, and no compensating charges imposed on imports in the case of charges other than turnover taxes, excise duties and other forms of indirect taxation unless the contemplated measures have been approved by the

Council. This Article, which has not yet been interpreted by the Court of Justice of the European Communities clearly implies that Articles 95, 96 and 97 need no decision of the Council of Ministers in order to have their effect as regards indirect taxes.

These fiscal provisions<sup>1</sup> have two purposes: (i) to ensure fair competition and (ii) to prevent distortions of competition. Goods originating from the Community are given national tax treatment in the country of destination. The Articles discussed here are in a sense only an implementation of the fundamental Articles 3 (f) and 7 of the E.E.C. Treaty. According to the Court of Justice, Article 95 (1) is 'a general and permanent rule of the Community system'<sup>2</sup> and it constitutes, 'in the fiscal field, the indispensable foundation of the common market'.<sup>3</sup>

In April 1968 the Community judges interpreted Articles 95 and 97 in the course of the following cases:

*In re Moltkerei-Zentrale Westfalen-Lippe GmbH v. Main Customs Office Paderborn*, at the request of the Federal Financial Court;<sup>4</sup>

*In re Firma Milchwerke Heinz Wöhrmann & Sohn KG v. Main Customs Office Bad Reichenhall*, at the request of the financial tribunal of Munich;<sup>5</sup>

<sup>1</sup> Problems concerning fiscal provisions of the E.E.C. Treaty have been discussed in specialized periodicals in Germany such as *Aussenwirtschaftsdienst des Betriebsberaters*; *Der Betrieb*; *Der Betriebsberater*; *Neue Juristische Wochenschrift*; *Zeitschrift für Zölle und Verbrauchssteuern*. The following is a selection—but by no means an exhaustive list—of articles available at the moment of writing:

*Aussenwirtschaftsdienst des Betriebsberaters* (1966): Arno Schulze-Brachmann, 'Die Beseitigung der Steuergrenzen zwischen den Mitgliedstaaten der EWG', pp. 269 et seq.; Dr. Peter Ulmer, 'Das Verbot der steuerlichen Diskriminierung von Einfuhrwaren in Artikel 95 des EWG-Vertrages und seine Auswirkungen auf das nationale Abgabenrecht', pp. 277 et seq.; Dr. Gert Meier, 'Umsatzausgleichsteuer und Justiziabilität des Artikels 97, Abs. 1 des EWG-Vertrages', pp. 420 et seq.

*Ibid.* (1967): Dr. Gert Meier, 'Aktuelle Fragen zur Umsatzausgleichsteuer', pp. 97 et seq.; Dr. Gert Meier, 'Die Umsatzausgleichsteuer als Abgabe zollgleicher Wirkung', pp. 140 et seq.; Dr. Gert Meier, 'Umsatzausgleichsteuer und das Verbot der Beibehaltung und Errichtung von Hemmungen im EWG-Warenverkehr', pp. 219 et seq.; Dr. Peter Dräger, 'Artikel 95 des EWG-Vertrages und nicht substituierbare Waren', pp. 224 et seq.; Dr. Helmut Debatin, 'Abgrenzung der Besteuerungskompetenzen in der EWG', pp. 249 et seq.; Dr. Peter Wendt, 'Ungeklärte Fragen im Streit um die Umsatzausgleichsteuer', pp. 348 et seq.; Dr. Gert Meier, 'Vorrang des Gemeinschaftsrechts und Justiziabilität von Gemeinschaftsnormen', pp. 413 et seq.; Dr. Dietrich Ehle, 'Massnahmen mit gleicher Wirkung wie mengenmässige Beschränkungen und ihre Abschaffung im Gemeinsamen Markt', pp. 453 et seq.

*Der Betrieb* (1967): Dr. Peter Wendt, 'Kein Rechtsschutz im Umsatzausgleichsteuersachen?', pp. 2047 et seq.

*Der Betriebsberater* (1967): Richard Zimmermann, 'Die neue Einfuhrumsatzsteuer', pp. 1243 et seq.

*Neue Juristische Wochenschrift* (1967): Dr. Dietrich Ehle, 'Auslegungsprobleme der steuerrechtlichen Vorschriften (Articles 95-8) des EWG-Vertrages', pp. 1689 et seq.

*Zeitschrift für Zölle und Verbrauchssteuern* (1967): Dr. Th. Ball, 'Rechtsunsicherheit bei der Umsatzausgleichsteuer', pp. 1-11, 33-43; Helmut Fricdl, 'Umsatzausgleichsteuer und EWG-Vertrag', pp. 334 et seq.

<sup>2</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. 12, p. 302.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, vol. 14, pp. 211 et seq.

<sup>5</sup> *Ibid.*, pp. 261 et seq.

*In re Firma Kurt Becher v. Main Customs Office Munich-Landsbergerstrasse*, at the request of the financial tribunal of Munich;<sup>1</sup>

*In re Firma Kunstmühle Tivoli v. Main Customs Office Würzburg*, at the request of the financial tribunal of Munich;<sup>2</sup>

*In re Firma Milch-, Fett- und Eierkontor GmbH v. Main Customs Office Saarbrücken*, at the request of the financial tribunal of Saarbrücken;<sup>3</sup>

*In re Firma Fink-Frucht GmbH v. Main Customs Office Munich-Landsbergerstrasse*, at the request of the financial tribunal of Munich;<sup>4</sup>

*In re Firma August Stier v. Main Customs Office Hamburg-Ericus*, at the request of the financial tribunal of Hamburg;<sup>5</sup>

*In re Firma Gebrüder Lück v. Main Customs Office Cologne-Rheinau*, at the request of the financial tribunal of Düsseldorf.<sup>6</sup>

Without going into too many details it is possible to sum up the facts of these cases as follows. A number of German firms imported agricultural products originating from the E.E.C. or from third States—in the *Wöhrmann* case from Austria, in the *Tivoli* case from the United States—into Germany. The commodities were cleared through the customs and the firms had to pay the Community levy which has superseded customs duties on agricultural products. However, the goods were charged with *Umsatzausgleichsteuer* or compensating turnover tax intended to offset the turnover tax burden borne by home products. It was against these tax orders that the plaintiff firms appealed on arguments drawn from Articles 95 and 97 of the E.E.C. Treaty as well as from certain E.E.C. regulations, in particular from regulations 13/64<sup>7</sup> and 19.<sup>8</sup> In accordance with Article 177 of the E.E.C. Treaty, the competent German financial tribunals referred a number of questions concerning E.E.C. law to the Court of Justice of the European Communities which interpreted them as follows.

(i) '*Internal charges*' in the meaning of Article 95. In the *Milchkontor* case the Court of Justice gave some explanations concerning the expression 'internal charges' used in Article 95. The same expression is also used in Articles 96 and 97. Since these fiscal provisions form a whole it may be assumed that the Court's interpretation holds also for these two Articles.

A tax raised within the system of a turnover tax legislation, the Court ruled, and intended to put all categories of domestic as well as imported products in the same fiscal position, was an 'internal charge' in the meaning

<sup>1</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. 14, pp. 275 et seq.

<sup>3</sup> *Ibid.*, pp. 305 et seq.

<sup>5</sup> *Ibid.*, pp. 347 et seq.

<sup>7</sup> *Règlement no. 13/64/CEE du Conseil, du 5 février 1964, portant établissement graduel d'une organisation commune des marchés dans les secteurs du lait et des produits laitiers, Journal officiel des C.E. (1964)*, pp. 549 et seq.

<sup>8</sup> *Règlement no. 19 du Conseil portant établissement graduel d'une organisation commune des marchés dans le secteur des céréales, ibid. (1962)*, pp. 933 et seq.

<sup>2</sup> *Ibid.*, pp. 293 et seq.

<sup>4</sup> *Ibid.*, pp. 327 et seq.

<sup>6</sup> *Ibid.*, pp. 359 et seq.



of Article 95.<sup>1</sup> The Community judges had regard to the system and the objective of the tax in general, not to its concrete effects in a particular case, in deciding that it fell under Article 95. The Court said that a tax of the above kind is an 'internal charge', but it did not give an exhaustive definition of this concept; in particular it did not find that any internal charge in the meaning of Article 95 is necessarily of the above kind. For example, a tax compensating charges which are not of a fiscal nature is not lawful under Article 95.

If the criteria developed by the Court are applied to the German *Umsatzausgleichsteuer* it is found that this charge forms an integral part of the German turnover tax legislation. It is indeed a turnover tax raised on imports which are exempted from charges of this kind in their country of origin. Paragraph 1 of the German Compensating Turnover Tax Law provides for the imposition of the tax in respect of operations defined as follows: 'The deliveries and other services which a head of an enterprise in this country imports against payment in the context of his business . . . 3. The importation of goods in this country (compensating tax)'.<sup>2</sup> The German compensating turnover tax must therefore be regarded as an internal charge in the meaning of Article 95 of the E.E.C. Treaty.

(ii) '*Direct*' and '*indirect*' charges referred to by Article 95 (1). The Court of Justice had to decide when internal charges apply 'directly or indirectly' to domestic products. It has already dealt with 'direct' and 'indirect' charges in the context not of Article 95 (1) but of Article 96. According to the Community judges the former designation applied to charges imposed on the end-product, the latter to charges raised in the course of production on semi-finished products, raw materials, and so on. Registration, stamp, mortgage, licence and publicity duties were not imposed directly or indirectly on products but on the manufacturing firms. The Court had not considered duties on means of production, packing, services and transport.<sup>3</sup> The question was whether these findings could be transposed into the context of Article 95 (1).

It was contended before the Court that directly imposed charges were not those laid down in the law, but those raised in actual fact, which might be lower, because allowance must be made for exemptions. *Prima facie* it seemed that there was a case. The Court of Justice had decided that the customs duties 'applied' in the sense of Articles 12 and 14 of the E.E.C. Treaty were not those provided for in the tariffs but those collected in reality.<sup>4</sup> Here was the starting-point for an argument by analogy. But it transpired that the 'exemptions' referred to, were refunds for exports, not

<sup>1</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. 14, p. 324.

<sup>2</sup> Reference drawn and translated from document JUR/EWG/510/67, p. 11.

<sup>3</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. 11, pp. 1069-70.

<sup>4</sup> *Ibid.*, vol. 8, p. 21.

for products consumed in the country itself. If refunds for exports were taken into consideration the average of the turnover taxes collected in fact would certainly fall below the legal rate. The fallacy of this argument was that Article 95 dealt only with charges on goods sold in the country itself, and not with those on exports. Under Article 95 imports originating from within the E.E.C. were granted national treatment as regards taxation. Domestic goods which were exported could not be compared with imports because they were not sold on the home market. The Court therefore ruled that charges directly imposed on domestic products were those which were laid down in the legal rate.<sup>1</sup>

It was submitted by argument *a contrario*, drawn from the Court's statements concerning Article 96, that the 'indirect' charges of a product did not include the tax burden on means of production, transport, packing, etc. The Court of Justice would not accept this view. The expression 'direct or indirect charges' must, said the Court, be interpreted extensively. It was to be assumed that the national and the imported product were at the same stage of manufacture. All charges imposed specifically and effectively on the domestic product in the earlier stages of its manufacture or sale must be considered under Article 95 (1). The incidence of the charges decreased in proportion to the different stages of manufacture, and could eventually be discounted.<sup>2</sup>

(iii) *The distinction between 'similar' national products in Article 95 (1) and 'other' national products in Article 95 (2).* According to Article 95 (1) States may not impose on imports from other Members internal charges in excess of those applied to 'similar domestic products'. Article 95 (2) provides that States may not impose on imports internal charges 'of such a nature as to afford indirect protection to other products'. The first section of Article 95 envisages a situation when imports are in competition with similar home products whereas this is not true of the second section. It was this latter provision which raised the greatest number of questions.

'Similar products' within the meaning of Article 95 (1) might have been defined as being interchangeable, in a relation of substitution. Yet the Court of Justice did not strive to give an economic definition of the similarity. It gave a purely legalistic definition of this concept: a relation of similarity in the meaning of Article 95 (1) existed between products falling under the same fiscal, customs, or statistical classification.<sup>3</sup> The Court has to bear the full responsibility for this interpretation which has not been suggested in any of the written arguments presented to the judges.

The 'other national products' referred to in Article 95 (2) were defined in accordance with economic criteria. They were goods competing with

<sup>1</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. 14, pp. 369-70, 371 (2).

<sup>2</sup> *Ibid.*, pp. 229, 232 (2).

<sup>3</sup> *Ibid.*, pp. 342, 344 (3(a)).

imports in one or several economic uses without being similar to them in the meaning of Article 95 (1). In an earlier case the Court had admitted that competition could exist between oranges on the one side, apples, pears and peaches on the other.<sup>1</sup> Even in the lack of direct competition, the Court found, a particular charge imposed on imports might be an unlawful protection of economic activities different from those engaged in the protection of the imported goods. It seems therefore that even products which were not in competition with imports might be other products in the meaning of Article 95 (1). In the opinion of the Court legal security required that the economic relations considered by Article 95 (2) were of a lasting and well-marked kind.<sup>2</sup>

(iv) *The rate of the charges which create protection unlawful under Article 95.* Here again the Court of Justice drew a distinction between the two sections of Article 95. Section 1 forbids charges on imports which are in excess of those on home products, and thus gives a precise term of reference. Section 2, however, gives no such reference; the unlawful character of charges flows from their protective effect alone. The domestic judge is entitled to determine the rate below which a charge ceases to create protective effects.<sup>3</sup> The Court of Justice thereby conceded national tribunals a very considerable power.

(v) *Even in the absence of national goods compensating turnover tax charges are lawful provided they do not impair the free circulation of goods.* The Court was asked whether compensating turnover taxes were lawful even in the absence of national goods falling under Article 95 and if so, whether the E.E.C. Treaty fixed limits to the States' right of taxation. It was submitted that Article 95 not only prohibited compensating taxes in excess of national turnover taxes but that it also authorized charges of this kind only on the condition they were justified, i.e. if there were national products whose tax burdens had to be compensated. It was even asked subsidiarily whether compensating duties would not otherwise be equivalent to quantitative restrictions in the meaning of Articles 30 et seq. of the E.E.C. Treaty.

The Court would not accept this interpretation of Article 95, and considered the objective and the system of compensating charges. They were part of a turnover tax legislation which applied not only to imports but also to national goods. Their evident purpose was to place imports and home products in the same fiscal position. Article 95 was helpful in the establishment of a common market ensuring the free circulation of goods but it did not support the conclusion that compensating taxes on imports were illegal in the absence of similar or competing home products.

The Court might have relied on Article 17 (3) of the Treaty, but it did not. This provision authorizes States to replace customs duties of a fiscal

<sup>1</sup> Ibid., vol. 9, pp. 296-7.

<sup>2</sup> Ibid., vol. 14, pp. 342-3, 344 (3(b)).

<sup>3</sup> Ibid., p. 343.



character by an internal charge which complies with Article 95. Customs duties of a fiscal character are collected on products such as, for example, tea or coffee, which are not produced in Germany. Thus it is but a short step to a conclusion that Article 95 permits duties on products which are not produced at home. The limits of the States' right to impose charges of this kind flows from the purposes of Article 95. The tax rates must not be so high as to jeopardize the free circulation of goods. No such hindrance exists, however, when the rates remain within the general limits of the national turnover tax legislation. Lastly, even in the absence of competing domestic goods, compensating turnover taxes could not be equivalent to quantitative restrictions in the meaning of Article 30. This Article and Article 95 institute different procedures for the elimination of the obstacles which they envisage and both cannot therefore be of concurrent application.<sup>1</sup>

(vi) *Compensating duties are not equivalent to customs duties.* The E.E.C. regulations establishing agricultural marketing organizations provide that customs and equivalent duties are incompatible with the Community levies raised on imports originating from within the Community or from third States, as in the *Wöhrmann* and *Tivoli* cases.<sup>2</sup> Because the compensating turnover taxes were raised in addition to the Community levies it was quite natural that importers should refuse to pay them, submitting that the compensating taxes were totally or at least partially, namely to the amount in excess of turnover tax on national products, equivalent to customs duties.

Article 95 applies only to intra-Community trade. In the cases discussed here the goods originated from third countries—in the *Wöhrmann* case the imported commodity was Austrian powdered milk, in the *Tivoli* case American wheat. The answer to the importers' arguments could thus not be derived from Article 95 but only from the relevant provisions of the E.E.C. regulations. The expression 'duties equivalent to customs duties' in the regulations must have the same meaning as in the Treaty itself because the regulations are subordinated to the Treaty which they implement. In the context of the Treaty the Court of Justice had already found in an earlier case<sup>3</sup> that duties imposed unilaterally on imported products to the exclusion of national products and which thus raised the price of imports were equivalent to customs duties because they had the same effect on the free circulation of goods. Discrimination between imports and national goods, and protection of the latter, are thus an essential feature of these equivalent duties.

<sup>1</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. 14, pp. 340-1, 344 (1), 356-8.

<sup>2</sup> Regulation 13/64/EEC, Article 12, paragraph 2; Regulation 19, Article 20, paragraph 1.

<sup>3</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. 8, pp. 827-8.

The compensating charge was part of the general system of the turnover tax which was raised on domestic as well as on imported products. It made no discrimination between them on the ground of their origin; its objective was fiscal equality between the two kinds of products, not protection of national goods. It could not therefore have effects comparable to a customs duty, neither as regards its total amount nor as regards the amount exceeding imposition on national goods.<sup>1</sup>

(vii) *The 'average rates' referred to in Article 97.* A number of questions concerning the 'average rates' mentioned in Article 97 were laid before the Court of Justice. It will be remembered that Article 97 authorizes States which levy a turnover tax calculated by a cumulative multi-stage system to establish 'average rates' for specific products or groups of products in the case of internal charges imposed by them on imported products. Some of the questions at least denote an incomplete comprehension of the compensating turnover tax. It cannot achieve its objective—the imposition, on imports, of a fiscal burden equal to that borne by home products—unless the total charge of these latter can be established. This cannot, however, be done exactly. Turnover taxes calculated by a multi-stage system are *ad valorem* duties imposed at the completion of each operation or dealing. No credit is given for taxes paid on earlier sales. Accordingly the total tax burden is cumulative and depends on the length of the production and distribution circuits. A similar product made by different manufacturers may therefore bear a different tax burden, with the consequence that the tax imposed on all products of the same kind can only be calculated by average rates established for instance on the basis of the most representative production circuits. The amount of administrative work required for a more accurate calculation of the turnover tax burden of every single production circuit would be beyond the capacity of the best-equipped public authorities. Even the most detailed calculations could not consider the incidence of every earlier tax, and in any case the result could only be approximative. It is therefore wholly unrealistic to ask that the compensating turnover tax on imports be established on the basis of 'concrete comparisons' with the tax imposed on home products, and it is not true that an 'average rate' can be introduced on the basis of exact arithmetical calculations as if it were not more complicated to reckon than, say, an average between 12, 9 and 6. It is even misleading to hold that calculations should be made as far as possible and evaluations only as far as necessary. The multi-stage cumulative turnover tax system entails that internal turnover tax rates and as a consequence also compensating rates are, as a rule, average rates.

There would be an exception to this rule if, for instance, the rate of the

<sup>1</sup> Ibid., vol. 14, pp. 271-3, 301-3.

compensating tax on imports were equal to the general turnover tax rate in force at home. In such a case imports would in all likelihood be treated favourably because the charge on similar domestic products is higher than the standard rate, owing to the incidence of the taxation of earlier operations. It is thus possible to imagine compensating rates which are not average rates in the meaning of Article 97.

The Court of Justice made no attempt to derive a definition of the average rate from Community law. In its view the application of Article 97 was subordinated to the double condition that (i), the State concerned raised the turnover tax according to a multi-stage cumulative system and that (ii), it had in fact availed itself of the faculty to fix average rates, provided for in Article 97. A rate introduced as an average rate in compliance with these conditions was effectively an average rate.<sup>1</sup>

Up to this point the Court still seemed to confirm the opinion sometimes put forward that it was Article 97 which authorized the States to fix average rates, with the consequence that only rates introduced after the coming into force of the E.E.C. Treaty could have been true average rates. This so-called 'authorization theory' is untenable because the Court added to its above statements that even rates established before the entry into force of the E.E.C. Treaty may be of an average character.<sup>2</sup> It must therefore suffice that a rate is substantially consistent with Article 97 without expressly referring to it. At the moment the Rome Treaty was concluded five Members out of six calculated turnover tax in accordance with a multi-stage system. It is certain that Article 97 was drafted in order to deal with the situation as it was then, and not only with the future.

The German 17th Law Amending the Turnover Tax Legislation, of 23 December 1966,<sup>3</sup> lays down that all compensating turnover tax rates concerning imports which compete with similar or comparable home products are average rates. Some of these compensating rates, however, were only general tax rates laid down without regard to the earlier accumulated turnover tax burden. It is therefore doubtful whether these rates are average in the sense of Article 97 because Germany did not in fact make use of the faculty referred to in this provision.

A few weeks after the ruling of the Court the concept 'average rate' was defined by Community law, with effect for the future. The Council of Ministers issued a directive binding upon States which introduced a common method for the calculation of average rates in the sense of Article 97.<sup>4</sup> This directive provides essentially that the average tax burden of a product—or a group of products—is equal to the weighed average of

<sup>1</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. 14, pp. 231, 233 (4), 287, 322, 325 (2).

<sup>2</sup> *Ibid.*, p. 322.

<sup>3</sup> *Bundesgesetzblatt* (1966), Part I, p. 702.

<sup>4</sup> *Directive 68/221/CEE*, of 30 April 1968, *Journal officiel des C.E.* (18 May 1968), p. 14.



the tax charges on the product—or group of products—in a number of representative production circuits. In order to assess the tax burden of a product at a given production stage the tax burden imposed on all factors of the cost price must be taken into consideration.

## PART II: THE ORIGINAL CONTEXT

If the problems of the tax barrier within an economic union are old, they are posed in a new context within the European Economic Community. The Court of Justice stated in *Firma Molkerei-Zentrale Westfalen-Lippe v. Main Customs Office Paderborn* that this Community constitutes a new legal order to the benefit of which the States have limited—although in restricted fields—their sovereign rights. Its subjects are not only the member States but also their citizens.<sup>1</sup> This statement repeats a passage from the much earlier case *Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Netherlands Fiscal Administration*: the Court had at that time considered the Community as a new legal order of international law.<sup>2</sup> This approach was dropped in *in re Molkerei-Zentrale*. In accordance with other dicta of the Court it must be concluded that the European judges have changed their mind and that they now consider this new legal order to be *sui generis*.

### 'Immediate applicability' of Article 95

The Court of Justice was asked to determine the legal effects of Article 95 in general and to reconsider in particular the ruling which it had given in the earlier case *Firma Alfons Lütticke v. Main Customs Office Saarlouis*.<sup>3</sup> The Community judges had found in that case that Article 95 (1) 'produces immediate effects and creates, for citizens, individual rights which municipal tribunals must safeguard'.<sup>4</sup> It was the first time the Court of Justice had been expressly asked to change one of its interpretations. True, some questions had already been referred to the Court on two occasions, but either before it had adjudicated,<sup>5</sup> or before its ruling had been published in the *Recueil de la jurisprudence*.<sup>6</sup> A prior interpretation could deprive of its justification, and empty of its content, the obligation of domestic tribunals to lay the same question once more before the Court of Justice;<sup>7</sup> but its rulings are not binding precedents of a general scope: municipal tribunals are therefore perfectly entitled to ask the Court of Justice to pass a second time on the same point, and to change its earlier interpretation.

<sup>1</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. 14, p. 226.

<sup>2</sup> *Ibid.*, vol. 9, p. 23.

<sup>3</sup> *Ibid.*, vol. 12, pp. 295 et seq.

<sup>4</sup> *Ibid.*, p. 304.

<sup>5</sup> *In re Da Costa*, *ibid.*, vol. 9, pp. 59 et seq.

<sup>6</sup> *In re Hessische Knappschaft*, *ibid.*, vol. 11, pp. 1191 et seq.

<sup>7</sup> *Ibid.*, vol. 9, pp. 75-6.

In the *Lütticke* case the Court had dealt with Article 95 (1): 'A Member State shall not impose . . . on the products of other Member States any internal charges of any kind in excess of those applied to domestic products', and in conjunction with Article 95 (3), 'Member States shall, not later than at the beginning of the second stage [i.e. by 1 January 1962] eliminate or amend any provisions existing when the Treaty came into force which conflict with the above rules'. In the opinion of the Court the two sections combined contained a general principle affected by a condition precedent. At the moment, provided for in Article 95 (3) the rule of non-discrimination, i.e. Article 95 (1), became effective as a 'clear and unconditional obligation'. No action by the institutions of the Community or by the authorities of the member States was required for the execution of Article 95 (1). The prohibition of discriminations was complete in itself, juridically perfect, and consequently fitted to 'produce direct effects in the legal relations between the Member States and their citizens'. If Article 95 'designates the Member States as the subjects of the obligation' this 'does not imply that private persons cannot benefit from it'. Moreover, Article 95 (3) 'leaves the Member States no margin of appreciation' as to the date of the performance of their obligation.<sup>1</sup> From these features the Court of Justice derived the 'immediate', i.e. the self-executing, effect of Article 95 (1).

On the basis of similar reasoning the Court of Justice had already ruled that the standstill obligations in Articles 53, 37 (2)<sup>2</sup> and 12<sup>3</sup> of the E.E.C. Treaty, formally addressed to the States alone, were directly applicable. Dealing with Article 12, the Court deemed it necessary to consider 'the spirit, the economy and the wording'<sup>4</sup> of the E.E.C. Treaty. Its objective, the creation of a common market, was of direct concern to the citizens of the Community; therefore the Treaty could create obligations not only between States. Its preamble referred, beyond the governments, to the peoples, called upon to collaborate in the functioning of the Community through the European Parliament. The very existence of Article 177 confirmed that citizens could invoke Community law before municipal tribunals.<sup>5</sup> The Court of Justice thus did its best to give Community law maximum effects, and some of its arguments were of a political rather than of a purely legal nature.

It was this well-settled line of case law which the Court was asked to reconsider, on the basis of different kinds of arguments drawn (i) from Community law and (ii) from German municipal law.

(i) One of the original features of the E.E.C. is the Court's power to establish a State's failure to fulfil any of its obligations under the Rome

<sup>1</sup> *In re Hessische Knappschaft*, *ibid.*, vol. 12, p. 302.

<sup>3</sup> *Ibid.*, vol. 9, p. 28.

<sup>2</sup> *Ibid.*, vol. 10, p. 1167.

<sup>4</sup> *Ibid.*, p. 22.

<sup>5</sup> *Ibid.*, p. 23.

Treaty. The Court is seized either by the Commission or by another State in accordance with Articles 169 and 170. The defaulting State is bound to take the measures required for the implementation of the judgment of the Court, in conformity with Article 171, but the Treaty does not provide for its enforcement against the State concerned. Articles 169, 170 and 171 exclude a State from taking the law into its own hands, exercising, for instance, reprisals against another Member. Any recourse to the Community procedure has momentous political implications, and therefore private persons are not entitled to set it in motion. They may, however, ask their government to press the matter by taking it up on its own behalf.

If the Court ruled that a State which upholds a fiscal law departing from Article 95 fails—in the sense of Articles 169 et seq.—to fulfil its Treaty obligations, this law would not be automatically repealed. The defaulting State would be obliged to set in motion a complicated and lengthy legislative procedure to achieve the required effect. If, however, Article 95 is immediately applicable, any victim of a discrimination may go to court and, provided the domestic judges are entitled to rely on this provision in order to put the plaintiff in the same position as if the State had<sup>1</sup> already performed its Treaty obligations, the legal position of an individual is stronger than that of the Community itself, because the Community is only entitled to press for the performance of the obligation. Thus a seemingly illogical conclusion flows from the two-tiered legal protection offered by the E.E.C. Treaty, if the Community Court upholds the position that Article 95 is self-executing. The Federal Financial Court made this point in its first *Moltkerei-Zentrale* judgment which referred a number of questions on interpretation to the Court of Justice:

Can a Treaty rule—in the present case Article 95—which in substance lays down a certain behaviour as an obligation for all Member States, and which thus entitles in the first place *the Community* to force the Member States concerned to perform their Treaty obligations, through the means provided to this effect in the Treaty, grant more rights to individuals than the content of the rule would suggest—even if the rule creates immediate rights for him? . . . Or is the individual's right in fact more extensive than that of the Community, i.e. may he be put in the same position as if the Member State had already performed its Treaty obligations, whereas the Community may only require their performance?<sup>1</sup>

Dealing with this objection the Court of Justice of the European Communities ruled out comparisons between the respective rights of private persons under Article 95, and of the Community under Articles 155 and 169. An individual could only hope to safeguard his rights in a particular case whereas the Community endeavoured to ensure the general and uniform observation of E.E.C. law. Therefore the substance, the object

<sup>1</sup> Judgment VII 156/65 of 18 July 1967, pp. 14–15.



and the effects of the guarantees given to persons on the one side, and of the competences bestowed on the Community on the other side were different.<sup>1</sup> In fact the procedures set out in Article 177 and in Articles 169 et seq. complemented each other. It was neither illogical in itself nor inconsistent with the E.E.C. Treaty that citizens should, in a concrete case, be put in the same position as if their State had already performed its Treaty obligations. Article 95 did not limit the power of municipal tribunals to avail themselves of appropriate procedures provided by domestic law in order to safeguard individual rights granted by Community law.<sup>2</sup> (ii) The Federal Government described the situation created by the *Lütticke* ruling in the Federal Republic of Germany as a 'state of legal emergency (*Rechtsnotstand*)'. More than 20,000 turnover tax orders had been impugned before financial tribunals, which would be kept busy for a long time indeed. The German judiciary was bound by Article 20 (3) of the German Fundamental Law to abide by 'Statutes and the law (*Gesetz und Recht*).<sup>3</sup> In view of the Federal Republic's failure to comply with the E.E.C. Treaty, it could not be the task of German financial tribunals to make up for omitted fiscal legislation by means of thousands of judgments, and still less so when the Treaty enabled the Community to take action in conformity with Article 169 of the Treaty. Moreover, these numerous financial tribunals might find differently, and the highest court in these matters, the Federal Financial Court, might not be able to eliminate contradictions between judgments. The German Government therefore considered immediate effects of Article 95 as a danger to the rule of law, to legal security and to judicial protection alike.

Many of these lawsuits, however, had been instituted on the implicit assumption that the *Lütticke* ruling entitled German tribunals to review average compensating turnover tax rates as to their conformity with the E.E.C. Treaty. According to Article 97, average rates are lawful provided they do not infringe the principles of Article 95. This reference to Article 95 does not necessarily mean that Article 97 itself is directly applicable. In fact a passage in the ruling of the *Lütticke* case rather suggested the contrary.<sup>3</sup> If Article 97 had no direct effects tribunals were not entitled to review average rates as to their conformity with the E.E.C. Treaty, and the overwhelming majority of claims must lose their legal basis.

Dealing with the objections drawn from German municipal law the Court of Justice of the European Communities made the general point that no arguments drawn from domestic law could prevail against the law of the E.E.C. Treaty, and that the complexity of the legal situation in a member

<sup>1</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. 14, p. 227.

<sup>2</sup> *Ibid.*, pp. 228-9.

<sup>3</sup> *Ibid.*, vol. 12, p. 303: '... cette règle [i.e. Article 97], par sa nature, n'est pas susceptible d'engendrer des effets directs dans les relations entre les États membres et leurs justiciables ...'.

State could not alter direct and uniform effects of Community law.<sup>1</sup> In addition to earlier arguments the Court referred in particular to 'the nature and the spirit' of the E.E.C. Treaty<sup>2</sup> in order to confirm its earlier interpretation that Article 95 (1) had direct effects.

The Court broke new ground when it declared Article 95 (2) '*apt to produce* immediate effects and to create, for citizens, individual rights which national tribunals must safeguard'.<sup>3</sup> It had never before pronounced on Article 95 (2). Its language was also slightly different when compared with the earlier pronouncement that 'Article 95 (1) *produces* immediate effects',<sup>4</sup> but this difference can hardly entail any difference in legal effects. Domestic tribunals could not question the Court's interpretation but they remained free to appreciate whether the economic situation required the application of Article 95 (2).

### *Conflicts between Community law and municipal law*

Immediately applicable Community law creates individual rights for persons just as domestic legislation does. A tribunal may therefore have to choose between a Community and a national rule which cannot be reconciled by any interpretation and which apply to the same facts. According to the Court of Justice, in case of conflict Community law must prevail even over subsequent domestic law.<sup>5</sup> The arguments in favour of the wholesale supremacy of Community law may be summed up as follows.

The States have transferred competences to the institutions of the Community and restricted their domestic jurisdiction accordingly. Owing to this division of competences *ratione materiae* between the States and the institutions of the Community national law is supreme over certain matters and Community law over others. The relation between these two legal systems comes down to the delimitation of their respective spheres, to be done in accordance with the procedures set out in Articles 169 et seq. and 177 of the E.E.C. Treaty. This line of reasoning may be referred to as the 'federal' argument in favour of the supremacy of Community law.

Another argument runs as follows. The States have created a uniform system of law intended to have the same effects in all the member States. Subsequent unilateral legislation cannot prevail over common rules accepted on the basis of reciprocity; otherwise Community law would no longer be common to all the States, and the foundation of the E.E.C. would be shaken. Furthermore, the Rome Treaty itself provides for escape clauses which exclude the possibility of the States' taking the law into their own hands. This argument may be called 'teleological'.

<sup>1</sup> Ibid., vol. 14, p. 228.

<sup>3</sup> Ibid., p. 344 (2).

<sup>5</sup> *In re ENEL*, ibid., vol. 10, pp. 1158-60, 1166 (in the operative part of the ruling).

<sup>2</sup> Ibid., p. 226.

<sup>4</sup> Ibid., p. 232 (1).

Domestic tribunals and writers did not always readily enter into these views. To call upon German public authorities and courts to enforce Article 95 rather than German law was—according to one legal writer—to incite them to disobey the national parliament. The supremacy of the E.E.C. Treaty over German law would have amounted to a confession *vis-à-vis* other States that the German legislature had failed to abide by the obligations of the State. It was doubtful whether tribunals were in a position to make such a censure.<sup>1</sup>

This is a wrong way to put the problem. German tribunals asked to enforce Article 95 rather than municipal law are required to settle a conflict between different rules, i.e. to perform a typically judicial function. Moreover, it is wrong to suggest that tribunals disobey the German parliament if they give preference to Article 95. The German parliament has authorized the ratification of the Rome Treaty by a law. Quite apart from the fact that the Treaty establishing the E.E.C. is different from domestic legislation, it is thus possible to contend that tribunals are, in a sense, asked to choose between two different expressions of the will of the German parliament.

Discussions of this kind have now lost most of their practical interest because the highest German tribunal, the Federal Constitutional Court, has recognized, at least implicitly, the supremacy of Community law, reasoning as follows. The Community is a new public authority independent from the States and it exercises the sovereign rights transferred by the States. Its acts need not be ratified, and cannot be repealed by the States.<sup>2</sup> This passage means that the effects of Community law cannot be baulked by municipal law, i.e. that Community law must prevail for reasons apparently derived from the 'federal' argument. Anyhow, in *Gebrüder Lück v. Main Customs Office Cologne-Reinau* the financial tribunal of Düsseldorf took the supremacy of Community law itself for granted and asked the Court of Justice to explain its implications as regards domestic legislation departing from Article 95 of the E.E.C. Treaty. Must this legislation be repealed or, having regard to Article 95 (3), was it void since 1 January 1962?<sup>3</sup>

This question does not cover all possibilities. The legislation concerned might subsist formally without being enforced. It is also necessary to consider the individual tax orders issued on the basis of the law which is in conflict with Article 95. These implementing acts may be upheld, annulled or voided as to the amount exceeding the lawful tax rate.

Before it is objected that the question of the financial tribunal is in-

<sup>1</sup> Dr. Th. Bail, 'Rechtsunsicherheit bei der Umsatzausgleichsteuer', *Zeitschrift für Zölle und Verbrauchssteuern* (1967), pp. 1-11 and 33-43, at pp. 34 and 35.

<sup>2</sup> Judgment of 18 October 1967, *Europarecht* (1968), pp. 134 et seq., at p. 136.

<sup>3</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. 14, p. 363, question 3.



admissible under Article 177 it is necessary to keep in mind that the Court of Justice is the judge of its own competence. There were reasons to believe that it would interpret Article 177 in such a way as to cover all questions which require a uniform answer in order to ensure uniform application of Community law. In this spirit, it not only determined the legal effects of the Rome Treaty in the member States, but it also worked out a uniform solution to the conflicts of Community law and municipal law consisting in the wholesale supremacy of the former over the latter. Would it not have been logical for the Court to take a further step in that direction and to explain the effects of this supremacy on conflicting municipal law?

The question posed by the financial tribunal of Düsseldorf concerns not only Community law but also domestic law, and the Court of Justice is not competent under Article 177 to pronounce on the validity of legislation of the States. It is true that it had been objected earlier that the effects of Community law as well as conflicts were indeed questions of municipal law, especially of constitutional law. The Court had brushed aside these objections. That could not be done so easily as far as the consequences of supremacy were concerned. A possible wholesale nullity of domestic legislation departing from Article 95 would not only have raised difficult legal questions in connection with its retroactive effect; it would also have deprived the States concerned of a suitable legal basis for the imposition of taxation of imports originating from third States. The Court of Justice must also have felt that it was not vital for the Community whether municipal law departing from the E.E.C. Treaty was voided or merely no longer applied provided it was recognized that Community law must prevail. Accordingly the Court of Justice firmly re-emphasized the supremacy of Community law in connection with Article 95 but, as far as its consequences were concerned, it referred to domestic law. Article 95 put no restriction on the municipal tribunals' right to avail themselves of all means of domestic law suitable for the protection of individual rights granted by Community law. These tribunals were in particular entitled to decide whether an excessive imposition was totally or partially void.<sup>1</sup>

Bound by this interpretation of the Court of Justice, the Federal Financial Court underlined in its second *Moltkerei-Zentrale* judgment that tribunals must enforce the supremacy of Community law. It ruled that tax rates can no longer be applied to the extent to which they exceed the imposition on imports permitted by that Article. Taxation orders are unlawful to the same extent.<sup>2</sup> The Federal Financial Court apparently authorized judicial review as to their conformity with Article 95 only

<sup>1</sup> Ibid., p. 370.

<sup>2</sup> Judgment VII 156/65 of 11 July 1968, 30 pp.; partially reproduced in *Europarecht* (1968), pp. 394 et seq., where no name of the parties to the dispute is given.

because the general tax rate on which they were based had been brought into conformity with Article 95 at the request of the Commission. Willingly or unwillingly it thus makes the direct effects of Article 95 dependent on a prior action of the Commission, which is in contradiction with the interpretation of the Court of Justice. Rates ruled by Article 95 are very few because the majority are average rates falling under Article 97. Rates of this kind, and taxation orders issued for their implementation, cannot be reviewed as to their conformity with the E.E.C. Treaty because—as will be explained below—the Court of Justice denied that Article 97 had direct effects.

According to reliable information the firm *Moltkerei-Zentrale* has impugned the judgment of the Federal Financial Court before the Federal Constitutional Court by way of a *Verfassungsbeschwerde*.<sup>1</sup> This procedure of ‘constitutional complaint’ may be instituted against any act of German public authorities which amounts to a denial of a fundamental right entrenched in the constitution.<sup>2</sup> It is apparently alleged that the Federal Financial Court has disregarded Article 177 of the E.E.C. Treaty in no less than eight different ways, in particular because it has failed to comply with the ruling of the Community Court. A fundamental right laid down in Article 101 (1) *in fine* of the German constitution is that no one may be denied his legal judge. A tribunal which omits to ask another tribunal for a preliminary ruling when it is compelled to do so infringes Article 101 (1). It is logical to assume that the same should hold for a tribunal which does not abide by an obligatory preliminary ruling. Owing to the lawful ratification of the Rome Treaty the Court of Justice of the European Communities must be considered as a legal judge in the meaning of Article 101 (1) of the German Fundamental Law. The Federal Constitutional Court should thus be able to enforce respect for the Community Court’s jurisdiction upon German tribunals. All this is, however, for the moment still a matter of mere conjecture.

### *Absence of ‘immediate effect’ of Article 97*

The question of the legal effects of Article 97, now laid explicitly before the Court of Justice, had been much discussed since the *Lütticke* case had explained in its reasons that Article 97 was a particular case of application of Article 95.<sup>3</sup> It had been inferred from this passage that Article 97 must have the same legal effect as Article 95 because, as a subordinated rule, it

<sup>1</sup> *Vereinigte Wirtschaftsdienste* (1 October 1968), I/6.

<sup>2</sup> Paragraph 90 of the *Gesetz über das Bundesverfassungsgericht* (Law on the Federal Constitutional Court) of 12 March 1951, *Bundesgesetzblatt* (1951), Part I, pp. 243 et seq.

<sup>3</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. 12, p. 303; in its context, however, the passage tends to suggest the opposite conclusion, because it reads as follows:

‘... ledit article [i.e. article 97] ... constitue une règle spéciale d’adaptation de l’article 95 et ... cette règle, par sa nature, n’est pas susceptible d’engendrer des effets directs dans les relations entre les États membres et leurs justiciables ...’.

should logically partake of the nature of the main rule. As a consequence domestic tribunals could not be entitled to review average compensating turnover tax rates as to their conformity with Article 95 of the Treaty.

True, according to Article 97 average rates must respect the principles laid down in Article 95. This reference means simply that the authors of the Treaty wanted to avoid in Article 97 the repetition of something which had already been said in a preceding Article. It does not mean that Article 97 must necessarily have the same effects as Article 95. Its relation to Article 95 is rather that of a *lex specialis* to a *lex generalis* and its existence is justified by the particular features of the cumulative multi-stage turnover tax system. Checked against the criteria developed by the Court of Justice, Article 97 cannot have immediate effects. As far as it is particularly relevant here this provision reads:

Any Member States . . . *may* . . . establish *average* rates for specific products or *groups* of products provided there is no infringement on the *principles* laid down in article 95 . . .

The italicized passages give the States a faculty which they are free to put to use or not; they necessarily leave them a margin for appreciation in the establishment of averages and of groups of products, in the observation of the principles of Article 95. Article 97 clearly needs implementation, and the measures which the States take are interposed between the rule and its application. For all these reasons Article 97 could not, in the view of the Court of Justice, create individual rights apt to be safeguarded by municipal tribunals.

The Community judges derived a further argument from the second section of Article 97. It entitles the Commission to issue directives or decisions to a State whose average rates do not conform with the principles of Article 95. The Commission thus makes an appreciation whether the States abide by Article 97; and not the Court of Justice which is normally competent under Article 169 to establish a State's failure. Therefore, Article 97 (2) departs, in a sense, from Article 169. The Commission's competence to issue directives or decisions to the defaulting State would be emptied of content if average rates could be reviewed by municipal tribunals as to their conformity with Article 95. The second section of Article 97, therefore, seems to exclude direct effects of the first but it does not, of course, prevent national judges from establishing that a given tax rate is indeed an average rate in the meaning of Article 97.<sup>1</sup>

In connection with the effects of Community law the preliminary rulings on Articles 95 and 97 are important in two ways. The Court repeated once more the criteria of immediate effects; it explained for the

<sup>1</sup> Ibid., vol. 14, pp. 229-31, 232 (3).



first time that such effects must be denied if a rule leaves the States a margin of discretion. The same distinction as to the effects may be drawn between acts of the institutions of the E.E.C.<sup>1</sup> Regulations have direct effects, directives are binding on the States in respect of the result to be achieved but they leave national authorities the choice of the adequate ways and means. Decisions 'binding in every respect' issued to States are, despite their definition, comparable to directives. These two-tiered effects of Community law correspond to a distinction between matters exclusively ruled by Community law and matters ruled only substantially by Community law and formally by national law. Any delimitation between the competence of the E.E.C. and the residual competence of the States must take this distinction into consideration.

### CONCLUSIONS

Ideally there should be no tax barriers at all in an economic union. Approximation of the national fiscal systems may be a useful step towards their elimination, and Article 99 of the E.E.C. Treaty provides that the Commission shall consider in what way the law of the various member States concerning turnover taxes, excise duties and other forms of indirect taxation, including compensating measures applying to exchanges between member States, can be harmonized. Article 100 enables the Council to issue directives for the harmonization of laws which have a direct incidence upon the establishment or functioning of the common market. Accordingly, on 11 April 1967, the Council of Ministers enacted two directives on the basis of these provisions.<sup>2</sup> The first obliges the States to replace the cumulative multi-stage turnover tax before 1 January 1970 by the value-added tax or *taxe sur la valeur ajoutée* (in abbreviation *t.v.a.*). The second concerns the structure and the application clauses of this new charge, which is basically a single-stage tax. It is calculated by reference to the price of goods or services at each operation but credit is given for all duties paid at an earlier stage so that the tax is actually applied only to the value added at each stage, not on the total. The amount of the tax paid is in exact proportion to the price of goods and services, independently from the length of the production and distribution circuits. Exemptions for exports and compensating duties on imports can be reckoned accurately without recourse to average rates.

<sup>1</sup> E.E.C. Treaty, Article 189.

<sup>2</sup> *Directive du Conseil 67/227/CEE* of 11 April 1967, *Journal officiel des C.E.* (1967), p. 1301; *Directive du Conseil 67/228/CEE* of 11 April 1967, *ibid.*, p. 1303; among the *travaux préparatoires* the following documents should be read: *Communauté économique européenne, Commission: Rapport du Comité fiscal et financier* (1962) and *Rapport général des sous-groupes A, B et C créés pour examiner différentes possibilités en vue d'une harmonisation des taxes sur le chiffre d'affaires* (1962); P. Nasini, 'Les impôts indirects dans le march communé, aspects juridiques', *L'Harmonisation dans les Communautés* (1968), pp. 111-13.

Germany<sup>1</sup> and the Netherlands<sup>2</sup> have already enacted laws implementing those directives. French tax legislation already incorporated the principle of the *taxe sur la valeur ajoutée* at the time when the E.E.C. Treaty came into force.<sup>3</sup> In Belgium<sup>4</sup> a bill is before parliament, and in Luxembourg<sup>5</sup> there exists for the moment only a draft text. As far as can be ascertained in January 1969 there is a good chance that all the members of the E.E.C.—with the possible exception of Italy—will have introduced the value-added tax by 1 January 1970, as prescribed in the first directive. This leads to the following conclusions.

First, the problems caused by the German *Umsatzsteuer* which led to so many cases in court now belong to the past because the value-added tax, introduced by a law of 29 May 1967,<sup>6</sup> became effective in Germany from 1 January 1968 onwards. It seems that the huge number of 20,000 disputes and the legal insecurity which prevailed pending the interpretation of the typical questions before the Court of Justice were powerful arguments for the speedy conclusion of the legislative procedure in Germany.

Secondly, the European Economic Community seems to succeed in a field where the *Union économique belgo-luxembourgeoise* and the Benelux can hardly boast any success. In this respect the E.E.C. has certainly not only caught up with but overtaken the two earlier regional unions. This does not, however, mean that the tax barrier is about to disappear in the common market. The States are still free to fix the tax rates at their convenience. In all likelihood the general value-added tax rate will be 20 per cent in Belgium, 19 per cent in France, 12 per cent in the Netherlands, 11 per cent in Germany and only 8 per cent in Luxembourg. Ironically enough it is thus between the two Members of the *U.E.B.L.* that the discrepancy is the biggest; the third Benelux State is in an intermediate position.

The tax barrier will disappear only if the rates are uniform everywhere. As a consequence, exemptions of exports and compensating duties on imports will no longer be necessary. Directives based on Articles 99 and 100 which would introduce uniform rates—provided of course this could be done politically—would perhaps go beyond the harmonization and approximation mentioned in these two provisions. They would still leave the States free to choose between the adequate procedures under national

<sup>1</sup> Law of 29 May 1967, *Bundesgesetzblatt* (1967), vol. 1, p. 545.

<sup>2</sup> Law of 28 June 1968, *Staatsblad*, 329.

<sup>3</sup> The last important law concerning the value-added tax is law no. 66-10 of 6 January 1966, *Journal officiel des C.E. (Lois et décrets)*, No. 5 of 7 January 1966.

<sup>4</sup> Document No. 88-1 of the *Chambre des représentants*, *Session extraordinaire 1968*, of 15 October 1968: *Texte du projet de loi belge créant le code de la taxe sur la valeur ajoutée*.

<sup>5</sup> *Ministère du Trésor — Direction de l'enregistrement et des domaines: la taxe sur la valeur ajoutée, projet d'étude* (July 1967).

<sup>6</sup> *Bundesgesetzblatt* (1967), vol. 1, p. 545.

law but even this discretion would be restricted indeed because taxes are likely to be everywhere reserved to legislation.

The repercussions of uniform turnover tax rates on the revenue of the States, and hence on the budget, may be enormous. Such considerations prevented, for instance, the effective introduction of uniform excise rates in the Benelux and the application of the convention of 18 February 1950. The pooling of the proceeds from a common turnover tax and their distribution on a basis agreed upon in advance—as in the case of the common excises in the *U.E.B.L.*—would be much more difficult still because it would be an even greater and indeed unprecedented inroad upon the sovereignty of States.

The main reason for the Community's relative success in the harmonization of turnover tax laws is surely to be found in the power of the Commission to submit proposals, i.e. draft texts of directives or regulations, to the Council of Ministers. When the Council acts on such a proposal it may adopt amendments to that proposal only unanimously. Moreover the Commission may put pressure on the defaulting States by instituting the procedure of Article 169, and the Court of Justice is entitled to interpret the directives and to enable municipal tribunals to find out whether national implementing legislation is consistent with the Community acts. In the Benelux and in the Belgo-Luxembourg Economic Union there is no such institution as the Commission and harmonization of turnover taxes could only be brought about by conventions. It is therefore possible that whatever success the E.E.C. has had in this field flows in the last resort from the competences bestowed upon its original institutions and from what the Court of Justice has so suitably called the creation of a new legal order.



# JOHN McMAHON

By P. J. ALLOTT

*Assistant Legal Adviser, Foreign and Commonwealth Office*

JOHN McMahon died on 12 April 1969 at the age of 32. He will be remembered for what he was as a person and for what he was and would have been as an international lawyer.

He was a Fellow and Dean of Hertford College, Oxford, having previously been Lecturer in law at Lincoln College, Oxford. He read law at Christ's College, Cambridge, and took a further degree at Cambridge and a master's degree at Harvard University in both cases specializing in international law. He took part in the student interne programme with the Office of Legal Affairs of the United Nations Secretariat in New York and did research work in Geneva principally on matters relating to international organizations. He had recently completed a period of some eighteen months as a Legal Officer in the Office of Legal Affairs of the United Nations Secretariat. After his return to Oxford he had continued as a Consultant to the United Nations in the preparation of studies on the sea-bed question and he was in New York on that business at the time of his death. His published work included four articles for the *British Year Book*.<sup>1</sup>

His career as an international lawyer was thus already exceptionally well founded and no one doubted that it would continue as well as it had begun. But it is as a representative of, and an inspiration to, what might be called a new wave of international law that it is perhaps most appropriate to remember him here. He was one of a group of lawyers who studied international law at Cambridge in the late 1950s and who believed themselves to be somewhere near the beginning of such a new wave of international law. They were of many nationalities and they had come to Cambridge (or stayed on at Cambridge) because, as a result of some notably forward-looking thinking on the part of those who arrange such matters, the possibility existed (and exists) to study international law in an academically serious but practical sort of way such as to enable the graduate to move on, with a deep personal commitment to international law, into any field where such a commitment can be put to use, whether in the diplomatic service, as

<sup>1</sup> 'The Court of the European Communities: Judicial Interpretation and International Organization', this *Year Book*, 37 (1961), p. 320.

'Legal Aspects of Outer Space', *ibid.*, 38 (1962), p. 339.

'The Legislative Techniques of the International Labour Organization', *ibid.*, 41 (1965-6),

p. 1.

'Legal Aspects of Outer Space: Recent Developments', *ibid.*, p. 417.

a government legal adviser, in the academic world, in an international organization or in private practice. The members of the particular group to which John McMahon belonged at Cambridge are now distributed throughout the world. Their paths cross from time to time and very often those paths were found to meet in the company of John McMahon. It was as if he had become the centre of an international network of younger international lawyers who had been with him at Cambridge or Harvard or the United Nations and who all counted him as a friend and gained from his enthusiasm and optimism.

He had concentrated on outer space law, on the law of international organizations and, more recently, on the regime to govern the sea-bed of the high seas. It is no coincidence that these are all topics where the role of international law is primarily positive and creative—law as the principle of functioning of an organism rather than as a body of rules. It is easy to forget that this aspect of international law is not new but there is no doubt that it has gained extraordinary momentum in recent years as a result of many contributing factors (among others, the emergence of the new nations with internationalist ideals but suspicious of a ‘class-interest’ in traditional international law, the so-called ideological conflicts between nations which weakened the self-confidence of value-based law, the new facts of international power stemming from new weapons and new relationships, the emergence of the managerial and cybernetics approaches to a wide range of problems). In this new context international law had to be treated differently, as something organic, inevitable, everyday, practical and natural rather than as something artificial or supernatural. John McMahon typified this Reformation or Enlightenment. He was an internationalist not merely by conviction but as an expression of his personality. His internationalism was communicated in his person as well as in his work. It is not only those who knew him personally who have suffered by his untimely death. But it is to his close friends and his family in particular that we express our sympathy knowing, as we do, something of what has been lost.

## NOTES

### AGREEMENTS IN SIMPLIFIED FORM— MODERN PERSPECTIVE\*

By FUAD S. HAMZEH, PH.D.<sup>1</sup>

*Legal Adviser, Ministry of Foreign Affairs of the State of Kuwait*

#### I. DOCTRINAL *VERSUS* THE PRACTICAL APPROACH

A cleavage of opinion exists among international lawyers with regard to the denomination of these international instruments and the role they can play in inter-contractual relationships between States. Ardent supporters of the classical approach to the conclusion of international treaties *stricto sensu* maintain that only treaties concluded in the most solemn manner and meeting the exigencies of internal constitutional provisions do conform with the general principles of conventional law.<sup>2</sup> They base their criticism on the premiss that agreements in simplified form are in essence acts signed by persons who have not been invested with the treaty-making power and who resort to such methods in order to evade the constitution.

An attempt has been made to classify these agreements<sup>3</sup> on the basis that they are diplomatic instruments concluded by ministers of foreign affairs or diplomatic agents. As to their unconstitutionality, the proponents of this strict approach refer to the stand taken by the advocates of either the monist or dualist theory. According to the former who accept the primacy of international juridical norms, non-observance of constitutional laws entails an absolute nullity in the domestic and in the international field,<sup>4</sup> whilst the latter theory restricts such nullity to the internal field.

In the classification made of these agreements, stretching from exchanges of notes and protocols to agreed minutes, memoranda of understanding and declarations,<sup>5</sup>

\* © Dr. Fuad S. Hamzeh, 1969.

<sup>1</sup> The present paper has been prepared in connection with the participation of the author in the English-speaking section of the Centre for Studies and Research of the Hague Academy of International Law. The author takes the opportunity to express his appreciation to the Academy, to Professor I. Seidl-Hohenveldern of the University of Cologne (Director of Studies of the English-speaking section), and to the other members of the section, who have participated in the discussions. However, the present paper is the work exclusively of the writer and represents his personal views.

<sup>2</sup> See in this respect G. Roussos, 'Les accords en forme simplifiée en droit international', *Revue hellénique de droit international*, 5 (1952), p. 255. Cf. also N. Veicopoulos, 'Accords internationaux en forme simplifiée', *Revue de droit international des sciences politiques et sociales*, 27 (1949), p. 174. E. Borchard, 'Shall the Executive Agreement replace the Treaty?', *American Journal of International Law*, 38 (1944), p. 639.

<sup>3</sup> Basdevant, *Recueil des cours*, 5 (1926), pp. 535-611. See also Ch. Rousseau, *Droit international public* (1953), p. 18.

<sup>4</sup> N. Veicopoulos, loc. cit. (above, n. 2), p. 172. Roussos, loc. cit. (above, n. 2), p. 252.

<sup>5</sup> In its 1962 Draft Articles on the Law of Treaties, the International Law Commission attempted to define such compacts by stating in Art. 1, para 1 (b) that a 'treaty in simplified form means a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument concluded by any similar procedure'.



it has been remarked that they are used only for the conclusion of agreements on topics of 'minor importance', and deal mainly with technical and administrative matters.<sup>1</sup> As to their object, doctrine has classified them, *inter alia*, as subsidiary instruments to a treaty or convention, as ancillary to it, as a means for interpreting it or executing it or terminating it, or as an altogether independent treaty creating legal rights and obligations and governed by international law.<sup>2</sup>

Be that as it may, State practice has consistently evolved towards the acceptance of agreements in simplified form as treaties,<sup>3</sup> and no legal distinction is drawn between them on the international plane.<sup>4</sup> This development can be attributed to the general increase in international intercourse and the rapid universal development of international contacts, where speed and informality become of the utmost importance.<sup>5</sup> It also arose from the necessity of alleviating the tedious and long-drawn constitutional procedures which hamper the prompt disposition of matters of considerable importance and of considerable political moment or of urgent character.<sup>6</sup>

From the diplomatic practice of various governments, it can be discerned that agreements in simplified form play a dual role. They either effect a self-executing agreement or apply provisionally the terms of a separate treaty pending its entry into force.<sup>7</sup> More often than not, air services agreements or cultural or commercial agreements or any similar treaties take years to be concluded through the process of negotiation, initialling, signature, ratification and entry into force—a matter which sometimes seriously affects the interests of both interested parties and deprives them of the mutual benefit they can derive therefrom—a situation which led to the feasibility of concluding a separate protocol or exchange of notes or an agreed minute, whereby it is stipulated that the terms of the treaty are to be applied provisionally and with immediate effect.<sup>8</sup>

*Yearbook of the International Law Commission* (1962), vol. 2, p. 163. It is also to be noted that this enumeration of the various formal procedures characteristic of this category of agreements is not exhaustive but merely illustrative. Cf. J. G. Castel, *International Law Chiefly as Interpreted and Applied in Canada* (1965), p. 816.

<sup>1</sup> 'Selon la doctrine, les accords de cette nature ne portent, en général, que sur des questions techniques, mineures ou dont le règlement n'excède pas les pouvoirs normalement dévolus à l'Exécutif.' Claude Chayct, 'Les accords en forme simplifiée', *Annuaire français de droit international* (1957), p. 5.

<sup>2</sup> D. P. O'Connell, *International Law* (1965), vol. 1, p. 211.

<sup>3</sup> '... practice would not have come into existence, had the device been vitiated by unconstitutional invalidity at its inception.' Cf. H. Blix, *Treaty-Making Power* (1960).

<sup>4</sup> 'In practice, treaties and executive agreements have been treated as having the same force in both international law and domestic law.' Q. Wright, 'The U.S. and International Agreements', *American Journal of International Law*, 38 (1944), pp. 345-6.

<sup>5</sup> 'The complexity of international life renders it inevitable that the technique of exchanges of notes should be frequently resorted to.' J. L. Weinstein, 'Exchanges of Notes', this *Year Book*, 29 (1952), p. 214.

<sup>6</sup> 'Il était naturel, dans ces conditions, que la pratique internationale ait cherché un moyen d'alléger cette procédure. La nécessité en était d'autant plus impérieuse que la procédure normale requiert un délai plus ou moins long entre la signature du traité et son entrée en vigueur.' C. Chayct, loc. cit. (n. 1 on this page), p. 4.

<sup>7</sup> Cf. in this regard, Art. 22 of the Final Draft of the International Law Commission in Doc. A/6309/Rev. 1, as amended by the First Plenipotentiary Conference of Vienna in 1968, where the term 'apply provisionally' has been substituted for the term 'enter into force provisionally'; Doc. A/Conf. 39/C. 1/L. 370, p. 122. This Article became Art. 25 in Doc. A/Conf. 39/22.

<sup>8</sup> It is noteworthy that most, if not all, bilateral air transport agreements are concluded in this manner. Another procedure which is followed sometimes is to initial the text of the Air Agreement and to annex to it an Exchange of Notes or an Agreed Minute putting the Agreement into immediate effect, i.e. on the date of signature of these related instruments. It also happens that an exchange of notes or an agreed minute is initialled only pending clearance and signature.

Another distinction to be drawn from practice is that relating to some documents falling under the appellation of agreements in simplified form but which do not have treaty effect.<sup>1</sup> These documents are merely diplomatic notes which usually contain an exposition of the facts of an affair, or a summary of the viewpoints expounded or the minutes of a meeting or a dialogue undertaken. As such, they cannot be considered as legally binding compacts, but serve to elucidate the positions taken by the interested parties.

In this context, it is worth while mentioning other international compacts that are devoid of any binding character, such as the 'gentlemen's agreements' or the 'joint communiqués' or 'joint statements'. These deal mainly with the formulation of a common policy or a common standard of behaviour, and fall short of imposing any legal commitment on the parties involved,<sup>2</sup> resting on the notion of moral responsibility and an engagement of honour.<sup>3</sup> Joint communiqués or statements are used, regularly, to express the results of official contacts or official visits made by statesmen or leading personalities to one another.

Inter-departmental agreements covering matters of technical or administrative importance have also become a prominent feature in the practice of States.<sup>4</sup> These agreements come into force on the date of signature<sup>5</sup> and serve to dispense with a mass of routine business in an informal and speedy manner.<sup>6</sup>

Similarly, the most common form of agreements in simplified form have been those treaties concluded in the form of exchanges of notes,<sup>7</sup> which constitute what is known

<sup>1</sup> 'A treaty, being a contract, must not be confused with various documents having relation to treaties but not in themselves treaties—namely, a *mémoire*, a proposal, a note verbale or a *procès-verbal*'. Oppenheim's *International Law* (8th ed., 1955), p. 878.

<sup>2</sup> 'Aussi, il y en a "gentlemen's agreements", qui sont considérés comme n'ayant qu'une valeur morale.' G. Roussos, loc. cit. (above, p. 179, n. 2), p. 251.

<sup>3</sup> 'Parmi les accords en forme simplifiée, une place spéciale doit être faite aux "gentlemen's agreements", accords internationaux dépourvus d'effets juridiques obligatoires et que la doctrine anglo-saxonne interprète comme des engagements d'honneur ne comportant aucune obligation juridique directe par les Parties tout en les liant moralement (Atlantic Charter of 1941).' Ch. Rousseau, op. cit. (above, p. 179, n. 2), p. 19.

<sup>4</sup> 'The practice has, however, developed in comparatively modern times . . . of making agreements not in this traditional form, but in the form of agreements between governments or even between government departments of different states.' J. Mervyn Jones, 'International Agreements other than Inter-State Agreements', this *Year Book*, 21 (1944), p. 111.

<sup>5</sup> 'In the case of inter-departmental agreements, ministerial and departmental officers are regarded as *ipso facto*, by their offices and duties, competent to sign agreements on behalf of their governments . . .'. Weinstein, loc. cit. (above, p. 180, n. 5), p. 208. 'Acting within the authority granted to them by their Governments, the Administrations would naturally bind their Governments by the agreements concluded by them, on the basis of the Roman Law maxim that "every official act is presumed to be valid until the contrary is proved".' Du Plooy, *Treaties and Inter-Governmental Agreements Between Commonwealth and Foreign States and Between Commonwealth States Inter Se* (1958), p. 45.

<sup>6</sup> 'The complex structure of the modern State has produced yet another type of agreement made directly between departments of State. Such agreements, which are known in French practice as "arrangements administratifs", and are specifically recognized in German practice as agreements "nicht solenne", deal with technical matters falling within the sphere of the department concerned', Mervyn Jones, loc. cit. (n. 4 on this page), p. 114. 'As regards inter-departmental agreements . . . these agreements are generally speaking, arrangements which concern matters of private law rather than matters of an international legal character and are not such as would be normally registrable under Art. 102 of the U.N. Charter.' Lord McNair, *The Law of Treaties* (1961), p. 20. Cf. O'Connell, op. cit. (above, p. 180, n. 2), p. 224, who holds a contrary view on the basis that the Article is wide enough to include inter-departmental instruments.

<sup>7</sup> 'Exchange of Notes, now extremely common; sometimes it may embody a more important agreement than the term suggests.' McNair, op. cit. in the preceding note, p. 24.



in private law as 'offer' and 'acceptance', and which are normally signed by ministers of foreign affairs or authorized diplomatic agents. None the less, practice has come to consider these agreements in simplified form as falling within the rubric of 'inter-governmental agreements';<sup>1</sup> whatever their designation,<sup>2</sup> they have a force equal to that of a treaty concluded in the most solemn manner.<sup>3</sup>

## II. FREQUENCY OF APPLICATION

Practically all States conclude nowadays a growing number of agreements in simplified form, namely without observing the formal requirements of their constitutions for the conclusion of treaties in due and proper form.<sup>4</sup> Nevertheless, these agreements are akin to the most solemn treaties as to their content, and they embrace a wide variety of subjects, touching upon vital interests of the contracting parties.<sup>5</sup> It may be worth mentioning that such important political acts as the signature of an alliance, the establishment of diplomatic relations, the confirmation of a protectorate, the recognition of other regimes and cession of territories have been concluded in this form.<sup>6</sup> The Acts signed in Geneva on 21 July 1954 putting an end to the conflict in Indo-China, the Protocol of Lausanne of 12 May 1949 accepting the Partition Plan of Palestine as the basis for the solution of the problem,<sup>7</sup> as well as Geneva Agreements of 1962 on the neutrality of Laos and the General Agreement on Tariffs and Trade are yet further examples.<sup>8</sup>

A perusal of the United Nations Treaty Series will show that more than one-third of registered international agreements have been in the form of exchanges of notes only,<sup>9</sup> and a very recent global survey of treaties from 1945 to 1965<sup>10</sup> shows that only 291 treaties were concluded, whilst the number of agreements was more than

<sup>1</sup> 'Most Exchanges of Notes . . . fall into the category of inter-governmental agreements.' McNair, *The Law of Treaties* (1961), p. 19. 'The paramount factor in the modern development of the exchange of notes as an instrument of importance is . . . the recently adopted practice of concluding inter-governmental agreements . . .'. Weinstein, loc. cit. (above, p. 180, n. 5), p. 214.

<sup>2</sup> 'The decisive factor in ascertaining the legal nature of an instrument as a treaty is not its description . . . but whether it is intended to create legal rights and obligations between the parties. Thus, by reference to that text, a *declaration* may or may not be a treaty.' Oppenheim, op. cit. (above, p. 181, n. 1), pp. 899-900. Cf. Mervyn Jones, loc. cit. (above, p. 181, n. 4), p. 122: 'The Moscow Three-Power Declaration on general security published in Moscow on Nov. 1st 1943, was in the form of an inter-governmental agreement.'

<sup>3</sup> 'On conviendra que ces accords "en forme simplifiée" dont la valeur n'a jamais été contestée ni la portée minimisée se rapprochent singulièrement quant à leur contenu des traités conclus dans la forme la plus solennelle.' Chayet, loc. cit. (above, p. 180, n. 1), p. 5.

<sup>4</sup> 'The practice of dispensing with ratification and expressly providing that the treaty shall enter into force upon signature has, in fact, become a prominent feature in the procedure of conclusion of treaties.' Oppenheim, op. cit. (above, p. 181, n. 1), p. 907.

<sup>5</sup> 'Agreements have included such matters as transfer of military aid, transfer and lease of military bases . . . mutual defence assistance. In other spheres, esp. commerce and finance, health, communications, taxes, shipping and the fast-expanding field of civil aviation . . .'. Weinstein, loc. cit. (above, p. 180, n. 5), pp. 211-12.

<sup>6</sup> Cf. Chayet, loc. cit. (above, p. 180, n. 1), p. 5.

<sup>7</sup> See in this respect F. S. Hamzeh, *International Conciliation*, p. 105 and Doc. A/927.

<sup>8</sup> 'The United States annexed Texas and Hawaii, ended the first World War, joined the I.L.O., the Universal Postal Union and the Pan American Union . . . by means other than the treaty-making process.' Q. Wright, loc. cit. (above, p. 180, n. 4), p. 343.

<sup>9</sup> 'Out of a total of 4,831 instruments published in the League of Nations Treaty Series from 1920 to 1946, 1,078 or nearly 25 per cent were exchanges of notes.' Weinstein, loc. cit. (above, p. 180, n. 5), p. 213.

<sup>10</sup> Peter H. Rohn, 'Institutions in Treaties—A global survey of magnitudes and Treaties . . .'. A study presented in Holland on 25-30 August 1968. Cf. Table 4 and Table 9.



4,400 and that of exchanges of notes more than 2,700. Furthermore, in the Index to the United Kingdom Treaty Series, 1967,<sup>1</sup> one cannot but observe the preponderant number of exchanges of notes and exchanges of letters constituting agreements on as wide a variety of subjects as the granting of loans, the amending of Air Services Agreements, the abolition of visas, the execution of technical co-operation programmes, the regulation of defence matters,<sup>2</sup> compensation, indemnification, as well as cultural and fiscal matters.<sup>3</sup>

The upsurge<sup>4</sup> in the number of these agreements stems from the fact that States are becoming more and more inter-dependent in various fields of life, with the consequence that means had to be devised in order to facilitate the conclusion of treaties.<sup>5</sup> In concluding such agreements, the executive branch of the government feels that it has the requisite authority *ipso jure* to bind the government in matters in which it alone is competent to act.<sup>6</sup> As we shall soon see, the relevance of constitutional provisions to the international validity of such treaties does not come into play.

The frequency with which States have resorted to this method of concluding treaties<sup>7</sup> is justified by the necessity of meeting the requirements of daily contacts in the international sphere, added to which is the suitability of such agreements to serve multifarious purposes and objects.<sup>8</sup>

### III. IRRELEVANCE OF CONSTITUTIONAL PROVISIONS AS TO THE VALIDITY OF AGREEMENTS IN SIMPLIFIED FORM

A perusal of the laws and practices of States<sup>9</sup> on the constitutional limitations affecting the exercise of the treaty-making process shows that some constitutions contain certain provisions on the conclusion of agreements in simplified form, whilst

<sup>1</sup> No. 111 (1967), Cmnd. 3665.

<sup>2</sup> Quite recently, treaties of alliance or of mutual defence have been terminated by means of exchanges of notes.

<sup>3</sup> 'From 1789 to 1939 the United States entered into nearly 2000 international instruments of which only 800 were made by the treaty process. The relative use of executive agreements has increased . . .'. Q. Wright, loc. cit. (above, p. 180, n. 4), p. 344. 'En fait, 30% des engagements de la France.' Chayet, loc. cit. (above, p. 180, n. 1), p. 10.

<sup>4</sup> 'The fact that many treaties are to-day concluded "in simplified form" is well recognized. . .'. *Yearbook of the International Law Commission* (1965), vol. 2, p. 13.

<sup>5</sup> 'A une époque relativement récente . . . la procédure de conclusion des traités internationaux s'est enrichie de nouvelles méthodes, appliquées souvent à côté de la procédure classique et tendant en général à faciliter la conclusion et l'entrée en vigueur des traités.' Guggenheim, *Traité de droit international public* (1967), vol. 1, p. 159.

<sup>6</sup> 'The decision as to which instrument of international agreement will be used in a particular situation must be made ultimately by the executive branch.' E. Byrd, *Treaties and Executive Agreements in the United States* (1960), p. 200. 'It is clear, therefore, that the making of international agreements by the executive . . . was considered by the Privy Council as being in the discretion of the executive who will decide what form the agreement will take and whose decision will not be questioned.' Du Plooy, op. cit. (above, p. 181, n. 5), p. 82.

<sup>7</sup> 'The Commonwealth States have participated in what appears to be a universal practice, viz., the ever-increasing use which has been and is still being made of concluding treaties more often than not as international agreements, in the inter-governmental form.' Ibid., p. 116. 'L'examen de la pratique des chancelleries fait apparaître que la procédure de l'accord en forme simplifiée est d'une utilisation au moins aussi courante que la méthode normale.' Chayet, loc. cit. (above, p. 180, n. 1), p. 7.

<sup>8</sup> A common feature found in some treaties, especially Air Services Agreements, is the standard clause whereby the treaty or agreement is amended or revised by means of exchanges of notes.

<sup>9</sup> See *United Nations Legislative Series, Laws and Practices Concerning the Conclusion of Treaties* (ST/LEG/SER.B/3) (1953).

most of them are silent. As a general rule, the treaty-making power is vested in the head of State, who can delegate it to other authorized persons.<sup>1</sup>

If some constitutions are silent, others refer to agreements of major political significance, or to international political treaties which must be submitted to parliament for approval,<sup>2</sup> or refer to agreements of a technical or administrative character or to government agreements or to agreements of a non-political character of minor importance which can be dealt with by the executive.<sup>3</sup> On the other hand, the constitution of the United States recognizes the power of the executive to conclude agreements and compacts as distinct from treaties that require the approval of a two-thirds majority of the Senate.

These executive agreements fall into three classes, namely those which have been also designated as legislative-executive agreements, i.e.: (1) those entered into pursuant to or in accordance with specific direction or authorization by the Congress, (2) those not given effect to except with the approval of Congress by specific sanction or implementation and (3) those agreements or understandings made with foreign governments by the executive solely under and in accordance with the executive's constitutional power.<sup>4</sup> The latter are made by the President pursuant to his explicitly granted authority as the 'executive' and as 'Commander-in-Chief of the army and navy', and as the sole organ of the nation in its external relations. He shall also take care that the laws be faithfully executed, thus assuming this task with regard to all those general laws of nations which govern the intercourse between the United States and foreign nations.

However, a smooth practice prevails in the United Kingdom<sup>5</sup> where all such treaties are laid before both Houses of Parliament for twenty-one sitting days, and a similar practice is followed in the Netherlands. This derives from the fact that the executive is empowered and competent to act by virtue of the confidence it enjoys in the House.

Where the constitutional provisions are silent, this has been interpreted as tacit approval for the conclusion by the executive of agreements in simplified form.<sup>6</sup> Where a distinction is made as outlined above, there are difficulties in drawing the dividing line between treaties and agreements as such. What is the demarcation line between a political treaty and a non-political one, and what are agreements of minor importance and those of major importance?<sup>7</sup> No hard and fast rule can be laid down,

<sup>1</sup> Austrian and Cambodian constitutions, loc. cit. (above, p. 183, n. 9), p. 11.

<sup>2</sup> Cf. the Australian constitution, and Art. 50 of the Austrian constitution, *ibid.*, p. 6 and p. 7.

<sup>3</sup> *Ibid.*, p. 11, 'Apart from treaties made between heads of states agreements of a technical or administrative character are also made by the Government of India . . .', *ibid.*, p. 63. 'For agreements of a non-political character of minor importance, certain functionaries are recognized as competent . . .', Pakistan, *ibid.*, p. 92.

<sup>4</sup> *Ibid.*, p. 130. 'There are no significant criteria, under the Constitution of the U.S. or in diplomatic practice of this Government, by which the *genus* "Treaty" can be distinguished from the *genus* "Executive Agreement", other than the single criterion of the procedure or authority by which the U.S. consent to ratification is obtained.' McDougal and Lans, 'Treaties and Congressional-Executive or Presidential Agreements', *Yale Law Journal*, 54 (1944-5), p. 199.

<sup>5</sup> 'The system of parliamentary control over the conclusion of treaties which exists in many countries does not prevail in the U.K. The consent of Parliament is not normally required for the negotiation or ratification of treaties . . .'. *U.N. Legislative Series* (above, p. 183, n. 9), p. 124.

<sup>6</sup> 'Si les articles de la Constitution ne sont pas à la lettre applicables aux accords en forme simplifiée, du moins s'est-on efforcé d'en respecter l'esprit . . . Les accords en forme simplifiée, comme les traités . . . sont publiés au Journal Officiel par un décret du Président, contresigné par le Président du Conseil et le Ministre des A. E.' Chayet, loc. cit. (above, p. 180, n. 1), p. 11.

<sup>7</sup> 'It has long been recognized that there is an undefined, and probably undefinable, borderline between executive agreements which may be made by the President alone and those that require



and the preponderant role of the executive in political and other related questions has militated in favour of resort to agreements in simplified form.<sup>1</sup>

These agreements are thus considered as binding, in general, under international law as well as under domestic law. Their binding effect is explained either by following the doctrine of irrelevance of the constitutional provisions concerning the conclusion of treaties, or by assuming that a reference of international law to such constitutional rules refers merely to the constitution 'as actually applied' rather than to the written document itself. The form in which treaties are concluded does not in any way affect their binding character<sup>2</sup> and there is no legal distinction between formal and informal engagements. If the agreement is intended to be binding by the parties, then the question of form is irrelevant.<sup>3</sup>

The rule of law that they are binding is deduced from practice and from the decision of municipal courts.<sup>4</sup> Although international jurisprudence is not very extensive on the matter,<sup>5</sup> municipal courts have considered the effect of these international instruments and have acted on the view that they constitute obligations binding on the States concerned and partake of the nature of treaties.<sup>6</sup> The United States Supreme Court also held that treaties and executive agreements have the same effect.<sup>7</sup> The regulation of this practice is justified by the notion of the delegation of power and authority by the head of the executive.<sup>8</sup>

It is a well-established rule that agreements in simplified form are internationally just as valid as formal treaties. There is no hierarchy between these various forms of validation by the Senate as treaties, or the Congress as Laws.' Dulles, 'The Making of Treaties and Executive Agreements', *American Journal of International Law*, 38 (1944), p. 594.

<sup>1</sup> 'The constitutional practice in regard to treaties in simplified form tends to be somewhat flexible; and the question whether or not to deal with a particular treaty under the procedures laid down in the constitution then becomes to some extent a matter of the political judgment of the executive. . . .' *Commentary on Art. 43 of the Draft Articles of the I.L.C.*, Doc. A/6309/Rev. 1, p. 70.

<sup>2</sup> 'International Law itself prescribes neither form nor procedure for the making of international engagements . . .'. McNair, *op. cit.* (above, p. 181, n. 6), pp. 6-7.

<sup>3</sup> 'From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols or exchanges of notes.' *Austro-German Customs Régime case*, *P.C.I.J.*, 1931, Ser. A/B. No. 41, p. 47.

<sup>4</sup> 'But the Courts have recognized a class of agreements, some of which are concluded by exchanges of notes, which can be validly incorporated into municipal law without ratification or publication.' Weinstein, *loc. cit.* (above, p. 180, n. 5), p. 216. Cf. the *Paris Agreement case* decided after the First World War by the German Reichsgericht in Civil Matters, and according to which the conclusion of treaties lay within the competence of the President of the Reich. Cf. also *Re Colman case* decided by the Paris Court of Appeal; *ibid.*, p. 222.

<sup>5</sup> 'The Franco-Swiss Custom case (1912) and the Rio Martin case (1924) contain definite decisions by arbitrators declining to take account of alleged breaches of constitutional limitations when upholding the validity respectively of a protocol and an exchange of notes, while the Metzger case contains an observation in the same sense.' *Commentary on Art. 43 of the Draft Articles of the I.L.C.*, p. 70.

<sup>6</sup> Cf. Weinstein, *loc. cit.*, p. 216.

<sup>7</sup> 'Under the legislation, the President entered into several "executive agreements", but they were never contested on the ground that they were invalid because they were not "treaties".' E. Byrd, *op. cit.* (above, p. 183, n. 6), p. 112.

<sup>8</sup> 'Cette pratique, que les nécessités de la vie internationale ont imposée à tous les États du monde, est courante en Belgique. Elle est une des créations les plus remarquables du droit des gens et du droit const. belge. Envisagée sous l'angle du droit const. belge, la régularité de cette pratique ne peut se justifier, au même titre que le pouvoir réglementaire des ministres, que par l'idée d'une délégation de la part du Roi agissant en tant que Chef de l'Exécutif.' P. De Visscher, 'Arrêt de la Cour de Cassation de Belgique du 25 nov. 1955', *Journal des tribunaux* (1956), p. 340.



registering inter-State consent.<sup>1</sup> They enjoy among themselves what has been termed an '*équivalence matérielle*,<sup>2</sup> and as we have already seen<sup>3</sup> they may deal with political acts of the utmost importance and they can no longer be considered as restricted to matters of secondary or minor importance. The decisive factor in ascertaining their legal nature is not their description, but whether it is intended that they create legal rights and obligations between the parties.<sup>4</sup>

#### IV. IMPACT OF I.L.C. FINAL DRAFT ON AGREEMENTS IN SIMPLIFIED FORM

The text provisionally adopted in 1962 by the International Law Commission contained a separate category for 'treaties in simplified form',<sup>5</sup> and this term was employed in Articles 4 and 12 of the Draft in connection with the rules governing 'full powers' and 'ratification' respectively. It was thus assumed that treaties may be signed without requiring the representatives of the parties to produce instruments of full powers, and that such treaties should be presumed not to be subject to ratification.<sup>6</sup> On re-examining the question, however, the Commission saw fit to drop this distinction between formal treaties and treaties in simplified form.<sup>7</sup> This is a welcome and desirable step; for such a distinction could have been interpreted as giving inferior rank to the agreements in simplified form. Furthermore, there seemed to be no real definition given and it constituted a repetition of the definition of treaty given in Article 1, para. 1 (a) of the 1962 Draft. The Commission<sup>8</sup> in the Commentary then given seemed to be begging the question by stating that the treaty forms falling under the rubric 'treaties in simplified form' do in most cases identify themselves by their simplified procedure.<sup>9</sup> The list of expressions given in the definition were neither necessary nor desirable. The definition employed in Articles 4 and 12 of the 1962

<sup>1</sup> 'Il n'existe aucune hiérarchie d'objet entre les traités et les accords en forme simplifiée.' Ch. Rousseau, op. cit. (above, p. 179, n. 3), p. 18. Cf. also above, p. 185, n. 4.

<sup>2</sup> Rousseau, op. cit. (above, p. 179, n. 3).

<sup>3</sup> Above, p. 182.

<sup>4</sup> 'What matters is the intention of the parties and that intention may be embodied in a treaty or Convention or protocol or even a declaration contained in the minutes of a Conference.' Castel, op. cit. (above, p. 179, n. 5), p. 815. 'The decisions of international tribunals and State practice appear to support a solution based upon the position taken by that group of jurists who consider that international law leaves to each State the determination of the organs and procedures by which its will to conclude treaties is formed, and is itself concerned exclusively with the external manifestations of this will on the international plane.' *Commentary on Art. 43 of the Draft of the I.L.C.*, p. 70 (paras 5 and 6).

<sup>5</sup> See above, p. 179, n. 5.

<sup>6</sup> Art. 4, para. 4 (b), and Art. 12, para. 2 (d). It was submitted that juridically, a treaty in simplified form is characterized by the absence of full powers and the waiving of ratification.

<sup>7</sup> 'The Special Rapporteur, having re-examined Arts. 4 and 12 in the light of the comments of Governments, is of the opinion that, if possible, those articles should now be reformulated without framing their provisions in terms of a distinction between formal treaties and treaties in simplified form.' *Yearbook of the International Law Commission* (1965), vol. 2, p. 13, para. 3. 'Nevertheless, after re-examining the question the Commission concluded that there is substance in the view that the concept of a "treaty in simplified form" lacks the degree of precision necessary for it to provide a satisfactory criterion for distinguishing between different categories of treaties in formulating the rules in Articles 4 and 12.' *American Journal of International Law*, 60 (1966), p. 162.

<sup>8</sup> Cf. *Yearbook of the International Law Commission* (1962), vol. 2, p. 163, para. 11 of the Commentary to Art. 1.

<sup>9</sup> 'The Commission did not find the distinction between formal and informal treaties easy to express . . .', *ibid.* (1965), vol. 2, p. 13, para. 1. Cf. *Austrian note verbale* of 11 November 1963—Doc. A/6309/Rev. 1, p. 108.

Draft took as a criterion the application of certain rules. But are these rules always applicable?<sup>1</sup> The adoption of that text would have created anomalies with regard to agreements in simplified form that were to be subject to ratification. Moreover, the use of the term 'treaty' by the Commission in its generic sense makes any distinction of such agreements in simplified form superfluous:<sup>2</sup> they are undoubtedly international agreements to which the Law of Treaties applies, since the law relating to validity, operation and effect, execution and enforcement, interpretation and termination applies to them.

Although the function of signature in the case of agreements in simplified form is not only authentication but, as a general rule, also an expression of the will to bind the signing State, there may be cases where such agreements are concluded subject to formal or informal ratification by one or both parties.<sup>3</sup> Informal ratification is here referred to in its wider sense and includes, for instance, an act of approval made by a minister to an instrument signed by a lower official. It is not uncommon in practice that, even when ratification is regarded as essential by one party, the other is ready to express its consent to be bound definitively by its signature.<sup>4</sup> Since no hard and fast rule can be laid down, the Final Draft of the International Law Commission,<sup>5</sup> in Articles 10 and 11, has met this contingency without impairing the general rule. Article 10 left it open for States to be bound by signature only if they so wished, whilst Article 11 met the requirements of ratification, if deemed necessary by the interested parties, without assuming *ipso facto* that agreements in simplified form should fall within the terms of either of the two Articles.

A further flexibility of approach was made at the First Plenipotentiary Conference of Vienna in 1968 when a proposed new article<sup>6</sup> was approved which recognized the possibility of States' becoming bound by a treaty constituted by instruments exchanged between them.

In order not to fall back again on the previous Draft, the Conference also rejected an Italian amendment to Article 6, para. 1 (b), which would have added the following sentence in order to dispense with full powers: 'and for the purpose of concluding an agreement between those States in conformity with diplomatic practice, in particular,

<sup>1</sup> 'Ratification, for example, though not usually required for treaties in simplified form is by no means unknown.' *Yearbook of the International Law Commission* (1965), vol. 2, p. 13. This refers to formal ratification. Cf. below, this page.

<sup>2</sup> 'The term "treaty in simplified form" in para. 1 (b), though current in use, seems to be superfluous in the context of the present draft articles.' *Note verbale* of Japan of 4 February 1964—Doc. A/6309/Rev. 1, p. 128. Cf. *note verbale* of the U.S. of 17 February 1964, on p. 170. Also letter of 20 December 1963 by the U.K., on p. 168.

<sup>3</sup> 'However, whereas exchanges of notes may require ratification, there has been a marked decline in provision for ratification in international agreements. Out of 578 instruments published in the Treaty Series in the years 1946–1952 inclusive, over 85 per cent contained no provision for ratification.' Weinstein, loc. cit. (above, p. 180, n. 5), p. 224.

<sup>4</sup> 'On doit mentionner le cas exceptionnel d'un engagement international qui est à la fois traité et accord en forme simplifiée (cas de l'accord d'aide mutuelle franco-américaine du 27.1. 1950, qui, pour des raisons d'ordre constitutionnel, est traité pour la France. — Cf. son art. 7—et *agreement* pour les États-Unis aux termes de l'art. 402 de la loi américaine d'aide militaire du 6 oct. 1949).' Ch. Rousseau, op. cit. (above, p. 179, n. 3), p. 19.

<sup>5</sup> The Draft adopted by the Commission at its 893rd meeting on 18 July 1966; Doc. A/6309/Rev. 1.

<sup>6</sup> *Article 10 bis* which reads: 'The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when: a) the instruments provide that their exchange shall have that effect; b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.' See Doc. A/Conf. 39/C 1/L. 370, p. 66.

in the form of exchanges of notes'. Instead, it substituted the following version which meets the present state of affairs: 'it appears *from the practice of the States concerned* or from other circumstances that their intention was to dispense with full powers'.<sup>1</sup> The new provision enables the States to dispense with full powers if that is their practice, without at the same time pinning them down to a general rule as was the case in the previous Draft of 1962. Thus, the provisions of Article 6 do fall in line with the concept outlined above, and meet at the same time the practice followed in concluding agreements in simplified form.

Agreements in simplified form are normally concluded by ministers of foreign affairs or by 'authorized' diplomatic agents or government functionaries. However, ambassadors should not be empowered *ipso facto* to bind their State by the conclusion of such agreements, unless they were *authorized* to do so by the Head of State or by the Minister of Foreign Affairs.<sup>2</sup> This falls in line with the version of Article 6, para. 2 (b) of the I.L.C. text and corresponds with practice whereby ambassadors sign exchanges of notes or similar instruments after being authorized to do so.<sup>3</sup> It cannot be assumed that letters of credential accrediting an ambassador to the receiving State confer upon him *ex officio* such a competence. This does not preclude him from negotiating and adopting the text of a treaty, for it has become the practice that ambassadors either join official government delegations or sometimes lead such delegations to negotiations for the conclusion of international agreements.

## V. CONCLUSION

Whether we use the term 'agreement in simplified form' or 'treaty in simplified form' which has been used by the International Law Commission, is a matter of terminology rather than of substance. In modern practice, it has been established that they do not differ from treaties as to their juridical nature or effect. The theory advanced that their assimilation to treaties ought to be discouraged for the reason that such agreements in simplified form did not require ratification, and as such violated municipal constitutional provisions with regard to treaty-making, does not seem to carry weight for the reasons outlined above.

Indeed, such agreements meet the exigencies of present-day international relations and contacts, where speed and informality play a prominent role. Although there may be certain differences between such agreements and formal treaties with regard to the method of conclusion and entry into force, such differences are not of a static nature, since, as we have already seen, international treaties can be concluded without being subject to ratification; whilst agreements in simplified form, such as exchanges of notes, might need ratification.

In their assimilation to treaties, and by virtue of the fact that they deal with a variety of subjects, sometimes of vital interest to the contracting parties, these

<sup>1</sup> Doc. A/Conf. 39/C. 1/L. 370, p. 46.

<sup>2</sup> According to H. Blix, *op. cit.* (above, p. 180, n. 3), p. 43, 'it is certain that under the municipal law of all states, diplomats need express authorization from their governments in order to give the final consent of the state to an international engagement'. Cf. the *Kauffman Incident* (Agreement signed in 1941), *ibid.*

<sup>3</sup> 'Article 3, para. 1 (c) of the Vienna Convention on Diplomatic Relations provides that the "functions of a diplomatic mission consist, *inter alia*, in . . . negotiating with the government of the receiving State." However, the qualification of Heads of diplomatic missions to represent their States is not considered in practice to extend, without production of full powers, to expressing the consent of their State to be bound by the treaty. Accordingly, sub-paragraph (b) limits their automatic qualifications to represent their State up to the point of "adoption" of the text.' *Commentary to Art. 6*, Doc. A/6309/Rev. 1, p. 26, para. (5).



agreements in simplified form have, to a large extent, replaced the traditional forms of treaties, namely those concluded in the head-of-State form or inter-State form. In these forms, the Contracting Parties were identified either as the Heads of State ('The King of Italy and the President of the U.S.'), or as the States themselves ('Italy and the U.S.').

Not only are agreements in simplified form usually concluded by the executive, but it is also the executive which is designated as the partner to the treaty. ('The Government of Italy and the U.S. Government'). Thus, it is most appropriate that these agreements are also called 'inter-governmental agreements'.

Supporters of the classical approach to the conclusion of treaties draw much of their strength from the division sometimes made in municipal law between 'treaties' and other international agreements. But this division is hardly tenable in international law, added to which is the fact that international jurisprudence tends to consider that the conclusion of agreements is within the discretion of the executive branch of the government. This is a result of the preponderant role of the executive on the internal as well as on the international plane, a role it assumes by virtue of the expansion and complexity of the problems it had to deal with in modern society. Furthermore, in States where constitutions are silent on the matter, or where they are largely unwritten, the written portions must necessarily look to the established practice to make good any deficiencies.

Agreements in simplified form have also played a role in the field of contractual relationships between States and international organizations. Such relationships are established by means of exchanges of notes or similar instruments, whilst multilateral agreements in simplified form are also not unknown.

Since there does not seem to be any distinction of legal relevance between formal and informal international instruments, it would have been highly confusing and contrary to current practice if the International Law Commission had accepted the notion embodied in the Harvard Research Draft Code on the Law of Treaties, namely to exclude exchanges of notes from the scope of treaties on the basis of difference of form rather than that of substance or legal effect. On the contrary, the Commission took the right step in the right direction, bearing in mind that the treaty in simplified form, far from being at all exceptional, is very common, and its use is steadily increasing. It not only included agreements in simplified form in its Draft Articles, but it also dispensed with the distinction that had been made in the 1962 text between formal treaties and treaties in simplified form, which were concluded by exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other method. Such a distinction could have been interpreted as giving lower rank to such agreements, and at the same time restricting States to certain principles and dogmas. The provisions in the Draft Articles which deal with signature and ratification give ample scope for States to contract international legal obligations, as an act of sovereignty, in the way and manner they deem most fit and suitable under the circumstances.

# MALAWI AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS\*

By MARC-ANDRÉ EISSEN<sup>1</sup>

By a Declaration made on 23 October 1953 in pursuance of Article 63 of the European Convention on Human Rights, the United Kingdom extended the applicability of the said Convention to more than forty territories for whose international relations it was responsible at the time.<sup>2</sup>

Nyasaland was then one of these territories but became independent on 6 July 1964. Consequently, the United Kingdom Permanent Representative to the Council of Europe notified the Secretary-General, on 12 August 1964, that Her Majesty's Government's responsibilities under the Convention had lapsed in respect of Malawi (formerly Nyasaland).<sup>3</sup>

On 24 November 1964, Mr. H. Kamuzu Banda, Prime Minister and Minister of External Affairs of Malawi, sent to the Secretary-General of the United Nations—but apparently not to the Secretary-General of the Council of Europe—a declaration whereby:

(. . .)

As regards *bilateral treaties*<sup>4</sup> validly concluded by the Government of the United Kingdom or by the Government of the former Federation of Rhodesia and Nyasaland, on behalf of the former Nyasaland Protectorate, or validly applied or extended by either of the said Governments to the territory of the former Nyasaland Protectorate, the Government of Malawi (was) willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period of eighteen months from the date of independence (. . .), unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of Malawi (would) regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving as having terminated.

(. . .)

The Government of Malawi (was) conscious that the above declaration (. . .) (could) not with equal facility be applied to *multilateral treaties*.<sup>4</sup> As regards these, therefore, the Government of Malawi (proposed) to review each of them individually and to indicate to the depositary in each case what steps it (wished) to take in relation to each such instrument—whether by way of confirmation of termination, confirmation of succession or accession. During such interim period of review, any party to a multilateral treaty which (had), prior to independence, been applied or extended to the former Nyasaland

\* © Marc-André Eissen, 1969.

<sup>1</sup> Registrar of the European Court of Human Rights. The opinions expressed in this note are those of the author and do not represent any official view.

<sup>2</sup> *Yearbook of the European Convention on Human Rights*, vol. 1, pp. 46–7.

<sup>3</sup> *Ibid.*, vol. 7, p. 36.

<sup>4</sup> Author's italics.

Protectorate, (might), on a basis of reciprocity, rely as against Malawi on the terms of such treaty.

(. . .).<sup>1</sup>

In May 1968 Mr. H. Kamuzu Banda, President of Malawi, addressed to the Secretary-General of the Council of Europe the following letter:

Sir,

As you are aware the European Convention for the Protection of Human Rights and Fundamental Freedoms was extended to the former Protectorate of Nyasaland by the United Kingdom on 23rd October 1953, and *continued to apply to Malawi under the terms and conditions of Malawi's declarations concerning inherited treaties*<sup>2</sup> to the Secretary General of the United Nations of 24th November 1964, and 5th January 1966, respectively.

Under the terms of those declarations Malawi declared that she would continue to consider herself bound on a basis of reciprocity vis-à-vis other States parties to any multilateral treaty, *including this Convention*,<sup>2</sup> which had been applied to the former Nyasaland until such time as she notified the depositary of such treaty of her formal accession or alternatively that she wished no longer to be bound by its provisions.

On behalf of the Government of Malawi I would now wish to inform you, as depositary for this Convention, that *as of this date Malawi considers herself to be no longer bound by the terms and conditions of the European Convention for the Protection of Human Rights and Fundamental Freedoms*,<sup>2</sup> signed at Rome on 4th November 1950, and considers that any legal connection therewith which devolved upon Malawi by reason of the ratification of this Convention by the United Kingdom should now be regarded as terminated from this date. I should be grateful if the decision of the Government of Malawi in this matter could be notified to the *other*<sup>2</sup> States parties to this Convention.

(. . .).<sup>3</sup>

This letter—which would seem to have been preceded by a correspondence of a preliminary character—clearly reflected a ‘State succession’ approach to the matter. Thus, it was couched in such terms as to amount virtually to an act of denunciation though it did not refer to the relevant provision of the Convention, namely Article 65. In accordance with Mr. Banda’s request, it was forwarded on 2 July 1968 by the Director of Legal Affairs of the Council of Europe, on behalf of the Secretary-General, to the Governments of all States Parties to the Convention. The Director pointed out, however, that this communication

. . . (was) not to be interpreted as a confirmation by the Secretary-General of the Council of Europe of the view that the European Convention for the Protection of Human Rights and Fundamental Freedoms continued to apply to Malawi under the terms and conditions of Malawi’s declarations to the Secretary-General of the United Nations of 24th November 1964, and 5th January 1966.<sup>3</sup>

Indeed, the ‘State succession’ thesis can scarcely be reconciled with the regional and closed nature of the Convention, especially as regards extra-European States.

<sup>1</sup> The full text of this declaration is to be found, *inter alia*, in the interim report submitted to the plenary conference of the International Law Association (Helsinki, August 1966) by the Committee on the Succession of New States to the Treaties and certain other Obligations of their Predecessors (pp. 16–17).

<sup>2</sup> Author’s italics.

<sup>3</sup> Reproduced with the authorization of Mr. Golsong, Director of Legal Affairs of the Council of Europe.



Arguments in support of this opinion have already been developed in this *Year Book*<sup>1</sup> and the result of the exchange of correspondence between the Government of Malawi and the Secretary-General of the Council of Europe on the subject of the European Convention on Human Rights tends to confirm that view.

<sup>1</sup> Eissen, 'The independence of Malta and the European Convention on Human Rights', this *Year Book* 41 (1965-6), pp. 401-10, especially pp. 405-7. Amongst recent studies about State succession, reference might be made to Mr. Marchand's 'Succession d'États et garantie des droits de l'homme', *Revue de la commission internationale de juristes*, vol. 8, pp. 39-54, and Mr. Mochi Onory's 'Aspects récents du problème de la succession aux traités', *Revue générale de droit international public* (1968), pp. 565-655.

# IS HIJACKING OF AIRCRAFT PIRACY IN INTERNATIONAL LAW?\*

By SAMI SHUBBER<sup>1</sup>

The hijacking of aircraft has become frequent. There have been, at the time of writing, over a hundred cases.<sup>2</sup>

\* © Dr. Sami Shubber, 1969.

<sup>1</sup> Lic.-En-Dr. (Baghdad), LL.M. (London), Ph.D. (Cantab.), Lecturer in International Law, Baghdad University.

<sup>2</sup> The following are the cases of hijacking of aircraft reported in newspapers and elsewhere: a Yugoslavian aircraft, 1952, *International Law Reports* (1952), vol. 19, p. 371, case No. 80; a Philippine airliner aircraft, 1953, W. Knauth; 'Crimes in Aircraft', *I.L.A. Conference*, 48 (1958), p. 290; a Hungarian Airlines Dakota aircraft, 13 July 1956, *The Times* (14 July 1956); a South Korean aircraft, 16 February 1958, and the abortive attempt to seize another South Korean aircraft, 10 April 1958, *ibid.* (11 April 1958); a Haitian army transporter aircraft, 10 April 1959, *ibid.* (11 April 1959); Cuban Airlines aircraft, October, 1 and 5 November 1958, 16 and 26 April 1959; see Dr. B. Cheng: 'Crimes on Board Aircraft', *Current Legal Problems*, 12 (1959), p. 177, n. 1; a National Airlines aircraft (a U.S. airliner), 1 May 1961, an Eastern Airlines aircraft, 25 July 1961, a U.S. Continental Airlines aircraft B-707, 9 August 1961, a Pan-American aircraft DC-8, 9 August 1961, a Portuguese Transportes Aeroes aircraft, 10 November 1961, a Venezuelan aircraft, 27 November 1961; see G. F. Fitzgerald: 'The Development of International Rules Concerning Offences and Certain Other Acts Committed on Board Aircraft', *Canadian Year Book of International Law*, 1 (1963), p. 240, n. 24; an attempt to hijack a United Airlines aircraft, *Daily Mirror* (27 October 1965); an Ethiopian Airlines DC-3 aircraft, 1 February 1966, *The Times* (2 February 1966); a Soviet civil aircraft, 9 August 1966, *ibid.* (10 August 1966); an Argentinian aircraft, 28 September 1966, *ibid.* (29 September 1966); a U.A.R. aircraft, 7 February 1967, *ibid.* (8 February 1967); a Nigerian Airways aircraft, 24 April 1967, *ibid.* (25 April 1967); a U.K.-registered aircraft carrying Mr. Tshombe, 1 July 1967, *The Observer* (2 July 1967); a Colombian aircraft, 6 August 1967, *The Times* (7 August 1967); an American light aircraft, 20 November 1967, *ibid.* (21 November 1967); an American aircraft in South Vietnam, 9 February 1968, *ibid.* (10 February 1968); a small American tourist aircraft, 18 February 1968, *ibid.* (19 February 1968); a U.S. airliner, 21 February 1968, *ibid.* (22 February 1968); a DC-8 aircraft of National Airlines, 12 March 1968, *ibid.* (13 March 1968); a Venezuelan aircraft, 22 March 1968, *ibid.* (23 March 1968); a Venezuelan jet airliner, 20 June 1968, *ibid.* (21 June 1968); a U.S. commercial aircraft, 29 June 1968, *ibid.* (1 July 1968); a U.S. airliner, Boeing 727, 1 July 1968, *ibid.* (2 July 1968); a National Airlines DC-8 jet aircraft, 17 July 1968, *ibid.* (18 July 1968); an Israeli El Al aircraft, Boeing 707, 23 July 1968, *ibid.* (24 July 1968); a case of hijacking of an Air Canada aircraft was reported in early September 1968, on B.B.C. television, but not in the press; an Eastern Airlines aircraft, Boeing 727, 20 September 1968, *The Times* (21 September 1968); two Colombian Avianca airliners, 22 September 1968, *ibid.* (23 September 1968); a Mexican Aeromaya airliner, for the first time by a woman alone, 7 October 1968, *ibid.* (8 October 1968); a U.S. aircraft, 4 November 1968, *The Guardian* (5 November 1968); an Olympic Airways aircraft, Boeing 707, 8 November 1968, *The Times* (9 November 1968); an Eastern airlines aircraft, Boeing 727, 24 November 1968, *ibid.* (25 November 1968); a Pan-American Airways aircraft, Boeing 707, 24 November 1968, *ibid.*; a U.S. Boeing 727 aircraft, 3 December 1968, *ibid.* (4 December 1968); a Trans-World Airlines Boeing 707 aircraft, 11 December 1968, *ibid.* (12 December 1968); an Eastern Airlines DC-8 aircraft, 19 December 1968, *ibid.* (20 December 1968); an Olympic Airways DC-6B aircraft, 2 January 1969, *ibid.* (3 January 1969); an Eastern Airlines jet, 3 January 1969, *ibid.* (4 January 1969); a Colombian Avianca aircraft, 7 January 1969, *ibid.* (8 January 1969); an Eastern Airlines Boeing 727, 9 January 1969, *The Guardian* (10 January 1969); a Peruvian airliner and an American aircraft, 11 January 1969, and an attempt to hijack a Delta Airlines aircraft, 13 January 1969, *The Times* (14 January 1969); an Eastern Airlines aircraft, and an Ecuadorian airliner, 19 January 1969, *ibid.* (20 January 1969); a U.S. Boeing 707 aircraft, 24 January 1969, *ibid.* (29 January 1969); a

The offence of hijacking has been popularly described as an act of piracy.<sup>1</sup> But this description does not necessarily reflect the legal position. Piracy is subject to the regime of the Geneva Convention on the High Seas of 1958,<sup>2</sup> while hijacking of aircraft is governed by the Tokyo Convention on Crimes and Certain Other Acts Committed on Board Aircraft of 1963.<sup>3</sup> It is the intention of this note to explain, first, what constitutes the crime of hijacking under the regime of the Tokyo Convention, 1963. This will be followed by a brief description of piracy. Then an attempt will be made to compare the two notions, to determine whether or not hijacking is, after all, covered by the concept of piracy under international law.

#### THE NOTION OF HIJACKING UNDER THE TOKYO CONVENTION

The Tokyo Convention has been designed to regulate the question of jurisdiction over crimes committed on board aircraft registered in States parties thereto. The material scope of the Convention covers crimes in general, as well as acts which are not crimes but may endanger the safety of persons or property on board, or of the aircraft itself, or which threaten law and order on board.<sup>4</sup> The offence of hijacking clearly falls within the wide scope of Article 1 of the Convention.<sup>5</sup> Nevertheless, the drafters of the Convention devoted one Chapter (IV) to Article 11 only, dealing specifically with

National Airlines Super DC-8 aircraft, 28 January 1969, *The Times* (29 January 1969); an Eastern Airlines aircraft, 28 January 1969, *ibid.* (30 January 1969); a National Airlines aircraft, 31 January 1969, *ibid.* (1 February 1969); an Eastern Airlines aircraft, 3 February 1969, *ibid.* (4 February 1969); an Eastern Airlines aircraft, 11 February 1969, *ibid.* (12 February 1969); a Venezuelan airliner, 13 February 1969, *ibid.* (14 February 1969); an Eastern Airlines aircraft, 25 February 1969, *ibid.* (26 February 1969); a Colombian aircraft, 11 March 1969, *ibid.* (12 March 1969); an American Delta aircraft, 26 March 1969, *ibid.* (27 March 1969); a Northeast Airlines Boeing 727, 26 May 1969, *ibid.* (27 May 1969); an Angolan Portuguese airliner, *ibid.* (10 June 1969); a Trans-World Airlines Boeing aircraft, 17 June 1969, *ibid.* (19 June 1969); a Colombian DC-3 aircraft, 20 June 1969, *ibid.* (21 June 1969); a Trans-World Airlines aircraft, *The Observer* (22 June 1969); an Eastern Airlines DC-8 aircraft, 22 June 1969, *The Times* (23 June 1969); a United Airlines DC-8 aircraft, 26 June 1969, *ibid.* (27 June 1969); an Eastern Airlines Boeing 727, 28 June 1969, *ibid.* (30 June 1969). For recent cases see *Addendum*, p. 204.

<sup>1</sup> The Venezuelan Minister of the Interior described the hijacking of a Venezuelan commercial aircraft, on 22 March 1968, as 'an act of piracy carried out at the orders of Dr. Fidel Castro'. See *The Times* (23 March 1968). In an editorial, *The Times* called hijacking of aircraft 'aerial piracy'; *ibid.* (29 July 1968, and also 20 December 1968). Professor I. Georgakis, the president of Olympic Airways, commenting on the hijacking of an Olympic Airways aircraft, 'urged governments and international civil aviation organizations to take effective measures to end acts of air piracy'; *ibid.* (3 January 1969). The Director-General of I.A.T.A., Mr. H. Hammarskjöld, in a letter to the 103 members of I.A.T.A., has asked that governments should take the necessary measures to recognize hijacking of aircraft as an international crime similar to acts of piracy and genocide'. See *Le Monde* (21 February 1969).

<sup>2</sup> For text of the Convention, see *American Journal of International Law* 52 (1958), pp. 842-51.

<sup>3</sup> I.C.A.O. Doc. 8364 (I.C.A.O. stands for International Civil Aviation Organization and is cited in abbreviation throughout this Note).

<sup>4</sup> Article 1 of the Tokyo Convention provides: '1. This Convention shall apply in respect of: a) offences against penal law; b) acts which, whether or not they are offences, may or do jeopardise the safety of the aircraft or of persons or property therein or which jeopardise good order and discipline on board.'

<sup>5</sup> See Sir Richard Wilberforce, as he then was: '... Hijacking by its nature quite certainly and quite obviously involves criminal activity of a kind which would anyway come under the Convention, either violence to the aircraft commander or passengers or theft of the aircraft or both...'; 'Crime in Aircraft', *Journal of the Royal Aeronautical Society*, 67 (1963), p. 180. It is interesting to note that the Tokyo Convention Act, 1967, does not contain any provision dealing specifically with the crime of hijacking.



the crime of unlawful seizure of aircraft. And the proposal to insert this article was adopted without any opposition.<sup>1</sup> Article 11, paragraph 1, runs as follows:

When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander, or to preserve his control of the aircraft.

Accordingly, not only actual seizure of the aircraft is regarded as an act of hijacking, but also any act of interference with the control of the aircraft, as well as generally any other wrongful exercise of control. However, a number of conditions have been laid down in Article 11, paragraph 1, which must be present before a particular act can be classified as hijacking. First, the action constituting hijacking must be taken by a person in the aircraft itself<sup>2</sup> while the aircraft is in flight.<sup>3</sup> This will exclude any interference with, or other wrongful exercise of control over the aircraft, from outside while the aircraft is not in flight. On the other hand, if the act is directed from the outside, while the aircraft is in flight, from another aircraft or a ship, against the aircraft commander, any member of the crew, property, or the aircraft itself, it may well be an act of piracy,<sup>4</sup> and will fall outside the scope of the Tokyo Convention.

It is to be noted that the status of the perpetrator is of no consequence, because the provision speaks of 'a person' in general. Therefore, hijacking can be committed by the co-pilot, any member of the crew, any passenger, or even a stowaway.

The second condition is that in order to come within the scope of Article 11, paragraph 1, of the Convention the act committed on board the aircraft has to be unlawful. The test of legality or otherwise will be that provided by the law of the competent jurisdiction.<sup>5</sup> Therefore, if the owner of an aircraft authorizes the co-pilot

<sup>1</sup> The proposal was put forward at Rome jointly by the delegations of the U.S. and Venezuela and was adopted by a vote of 27 to nil; Legal Committee of I.C.A.O., 14th Session, Rome, 28 August-15 September 1962, vol. 1, Minutes, *I.C.A.O. Doc. 8302-LC/150-1*, p. 160.

<sup>2</sup> See the statement of Sir Richard Wilberforce, as he then was, at the Tokyo Conference, 1963. Commenting on Article 4 (1) of the Rome draft of the Tokyo Convention (Article 11 of the Tokyo Convention) he proposed that: '... it be made plain that the article as a whole provided against a seizure committed by a person on board. It seemed, in fact, impossible to conceive of any case to which this article would apply in which the act would not have been committed by a person on board, although, of course, there might be long-distance interference with the radar by outside persons. But these cases would not come within the article'; International Conference on Air Law, Tokyo, August-September 1963, vol. 1, Minutes, *I.C.A.O. Doc. 8565-LC/152-1*, p. 325, paragraph 100. Contrast this statement with that of the Spanish representative, who said: '... The U.K. proposal to provide that only a person on board the aircraft was involved might also represent an excessive restriction. The Conference had defined an aircraft as being in flight from the moment the power was applied. There might be a conspiracy among people who were not on board, but on the ground and very near the aircraft', *ibid.*, p. 327, paragraph 111. The U.K. proposal, however, was adopted by a small majority of 6 to 5; *ibid.*, p. 328, paragraph 126.

<sup>3</sup> According to Article 1, paragraph 3, of the Tokyo Convention, '... an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends'.

<sup>4</sup> See below, p. 199.

<sup>5</sup> Under the regime of the Tokyo Convention two competent jurisdictions have been recognized, namely, the State of registration of the aircraft (Article 3), and, under certain conditions, the State flown over (Article 4). See also R. P. Boyle and R. Pulsifer (commenting on Article 11 (1) of the Convention): 'The question of whether a particular act is lawful or unlawful is to be judged by the law of the State of registration of the aircraft or the law of the State in whose airspace the aircraft may be in flight.' 'The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft', *Journal of Air Law and Commerce*, 30 (1964), p. 345.

to take over the command of the aircraft, and the latter interferes with the control in order to carry out the orders of the owner, there is no case of hijacking. This is so because the person concerned will be acting lawfully, and will not be illegally interfering with the control of that aircraft. The same applies to interference with, or seizure of, aircraft exercised by a police officer for the purpose of carrying out the orders of a court of law.

Thirdly, in order that a particular act be covered by Article 11 (1), it has to be committed by force or the threat of force. This naturally implies any use of physical force, as well as the use of weapons and fire-arms, such as shooting the pilot; or the threat of the use of force, such as holding a gun against the pilot's head and ordering him to alter course.<sup>1</sup> More often than not, the pilot in command is subjected to a threat of force rather than to its actual use.<sup>2</sup> The reason for this is, probably, that the hijackers cannot afford to kill or wound the pilot because of the danger to themselves and to the aircraft. However, they may do so if one of them is a trained pilot and the commander of the aircraft refuses to obey their orders, or if they have the connivance or co-operation of the co-pilot.

The provision speaks of the commission of the offence of hijacking by force or threat of force. But what would be the position if, for example, the pilot had been drugged and the aircraft was seized by the hijackers after the pilot had lost consciousness? Such a situation was envisaged by the Chairman of the Drafting Committee of the Tokyo Convention.<sup>3</sup> Does the fact that there is no use or threat of force here cause this situation to be excluded from the application of Article 11, paragraph 1?

Two answers can be advanced. The first is in accordance with the literal interpretation of the provision. According to this, there is no crime of hijacking, simply because the means used to commit the crime are not among those specifically mentioned in the provision. The second answer relies on a different rule of interpretation. It is to the effect that treaties should be interpreted according to their reasonable sense.<sup>4</sup> It is

<sup>1</sup> See the statement of the Chairman of the Drafting Committee, the Swedish representative, at the Tokyo Conference, 1963: 'Hijacking by violence was the most typical case. Thus, somebody knocked down the pilot or shot him and then conducted the aircraft. There was also the case of a serious threat where someone held up a gun and threatened to kill a person. There was the case of putting a drug into a drink which was given to the pilot so that the command of the aircraft could be taken over. There was the further case where the pilot could be cheated by a person who pretended that he had been sent by the operator to take over the aircraft'; loc. cit. (above, p. 195, n. 2), p. 324, paragraph 96.

<sup>2</sup> To give a few examples of these cases, see the hijacking of an Ethiopian aircraft, 1 February 1966, when the aircraft commander was forced to land, and no actual use of force was reported; *The Times* (2 February 1966). Another case is an unsuccessful attempt to seize a Soviet aircraft on 9 August 1966, when two passengers threatened with guns the other passengers, and the third tried to threaten the aircraft commander; *ibid.* (10 August 1966). The same method was used against an Argentinian aircraft on 28 September 1966; *ibid.* (29 September 1966). This was also the case in the hijacking of the aircraft carrying Mr. Tshombe, on 1 July 1967; *The Observer* (2 July 1967). The same method was used in the hijacking of a Greek aircraft, on 8 November 1968; *The Times* (9 November 1968). The pilot of another Greek aircraft was threatened at gun point by a hijacker on 2 January 1969; *ibid.* (3 January 1969). A child was held hostage by an armed hijacker of a U.S. aircraft on 3 January 1969; *ibid.* (4 January 1969). However, there have been cases where the aircraft commander was shot or wounded: see the abortive attempt to seize a South Korean aircraft in 1958; *ibid.* (11 April 1958). See also the case of the hijacking of a Haitian army aircraft in 1959; *ibid.* (11 April 1959).

<sup>3</sup> See above, n. 1 on this page.

<sup>4</sup> 'All treaties must be interpreted according to their reasonable, in contradistinction to their literal, sense'. Oppenheim, *International Law*, vol. 1 (8th ed., 1955), p. 952, n. 1. See also Article 28 of the I.L.C. Draft Articles on the Law of Treaties, adopted in 1966: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the



submitted that the second answer is to be preferred, because the first leads to unreasonable results. Indeed, Article 11 has been designed to deal specifically with the crime of hijacking, in spite of the fact that such a crime is covered by the general scope of the Convention (Article 1 (1) (a)). With this aim in mind, it cannot be reasonably argued that an act having all the characteristics of hijacking, except the means mentioned in the provision, is not to be regarded as an unlawful seizure of aircraft.<sup>1</sup>

It may be observed, however, that according to Article 11, paragraph 1, of the Tokyo Convention, offences of hijacking are subject to the Convention even before they have been committed. That is to say, when such acts are about to be committed, the aircraft commander may exercise his rights under the Convention, and may ask Contracting States for help. But there is some doubt as to the precise meaning of the phrase 'an act is about to be committed'.<sup>2</sup> Does it mean that the initial stages of the offence of hijacking have been carried out? Or does it imply the existence of evidence to that effect? The discussions leading to the adoption of the provision during the Tokyo Conference of 1963 may throw some light on the meaning of this phrase.

The French representative at the Conference suggested that Article 4 (1) of the Rome draft of the Tokyo Convention (now Article 11 (1)) should include the concept of attempt. He said: 'The French text should include the concept of a "*tentative*" (English "attempt") as this would be an act that would be punishable according to French Law. Therefore the text should read: "*a tenté d'accomplir un de ces actes*".'<sup>3</sup> He went on to say that: '... it was impossible, legally speaking, to ask States to take actions when there had been a mere threat which had no external manifestations'.<sup>4</sup> The French proposal was supported by the Italian representative, who stated that an '... attempt involved the beginning of an action which, in its fulfilment, would lead to a violation of the law'.<sup>5</sup> The delegation of Haiti<sup>6</sup> and the Congo (Brazzaville)<sup>7</sup> supported the French proposal. The Spanish representative, on the other hand, thought that '... Article 4 [of the Rome draft, Article 11 of the Tokyo Convention] should express not only the commission of the offence, but the intent to commit the offence.' In his opinion, it was necessary to adopt an active attitude in order to prevent the offence before it was committed.<sup>8</sup> This statement prompted the United Kingdom's representative, Mr. Kean, to ask:

... whether the aircraft commander would be entitled to summon help from Contracting States if he knew, on the basis of conversations which had been reported to him, that circumstances of its conclusion, in order to ... determine the meaning when the interpretation according to Article 27 [literal interpretation]: (a) ... (b) Leads to a result which is manifestly ... unreasonable'; *American Journal of International Law*, 61 (1967), p. 349. The provision remained unchanged in the text adopted at Vienna, 1969, but Article 28 has become Article 32 of the Vienna Convention on the Law of Treaties, and Article 27 has become Article 31 thereof. See *ibid.* 63 (1969), p. 885.

<sup>1</sup> See the remarks made by the Australian representative at the Tokyo Conference, 1963: '... What the Conference was concerned with in the particular case under consideration was the end result and not the means by which it had been accomplished. Hijacking of an aircraft might be accomplished in many ways other than by violence. The Conference was not worried about how the hijacking had been achieved but wanted to restore control to the commander or lawful authorities'; *loc. cit.* (above, p. 195, n. 2), p. 325, paragraph 97. See also above, p. 196, n. 1.

<sup>2</sup> The Argentinian representative at the Tokyo Conference called upon the Conference to '... determine the exact meaning of the words "is about to commit" because a misunderstanding of the scope of these words might cause serious damage to a passenger on board the aircraft'. He went on to suggest that 'mention must be made of specific acts or preparatory acts'; *ibid.*, p. 176, paragraph 48. The delegation of Chile supported Argentina; *ibid.*, p. 177, paragraph 49.

<sup>3</sup> *Ibid.*, p. 149, paragraph 23.

<sup>5</sup> *Ibid.*, p. 149, paragraphs 29 and 30.

<sup>7</sup> *Ibid.*, paragraph 32.

<sup>4</sup> *Ibid.*, p. 151, paragraph 39.

<sup>6</sup> *Ibid.*, paragraph 31.

<sup>8</sup> *Ibid.*, p. 152, paragraph 49.



there was a threat of hijacking, although no attempt had yet been made. In such a case, would the obligations of Article 4 [of the Rome draft] apply or not? In this regard, it was possible that passengers whose conversation had been overheard might have agreed to make an attempt only in an hour's time.<sup>1</sup>

The representative of the Netherlands thought that Article 4 (1) of the Rome draft did not apply to an attempted hijacking. He said that:

It had been proposed that the article under discussion should also be applied in the case of an attempt. But that was an impossibility. The provision concerned imposed on each Contracting State the obligation to restore control of the aircraft to its lawful commander. But the essential aspect of an attempt was that the act was not successful. Hence, in the case of an attempt the part of the provision concerned with restoration of the aircraft would not apply.<sup>2</sup>

In the end, the Conference decided to refer the provision to the Drafting Committee, with the task of studying all the aspects of the discussion.<sup>3</sup> As a result of the drafting process, the phrase 'such an act is about to be committed' was coined.

It would appear that there was a difference of opinion at the Conference whether or not the provision on hijacking applied to the intention, or to an attempt to commit the offence. The majority of delegates, however, seem to have preferred the provision not to apply to mere verbal threats or unmanifested intentions to commit the crime of hijacking. This may be inferred from the support which the French proposal received at the time.<sup>4</sup> Viewed against such a background, the phrase may be interpreted to mean that some manifestation of the intention to hijack an aircraft should take place, before Article 11, paragraph 1, of the Tokyo Convention can be invoked.<sup>5</sup> For instance, some passengers intending to seize an aircraft by force behave in such a way that their intention becomes manifest, although they have not actually seized or threatened to seize the aircraft. Their offence is about to be committed, but the initial stages or signs of the commission of the offence, as such, have not been carried out. Nevertheless, such activities constitute the crime of hijacking of aircraft within the context of the Tokyo Convention. This may be compared with the question raised by Mr. Kean<sup>6</sup> concerning the aircraft commander hearing about conversations indicating the existence of a threat to hijack an aircraft, although no attempt has yet been made. It would appear that there is no offence unless something more than the conversation materializes (according to the point of view advanced above). For instance, if the plotters are about to attack the cabin of the aircraft, then it could be said that an act of hijacking of aircraft has occurred. But as long as the intention to commit such an offence remains in the minds of the would-be offenders, and no manifestation to carry it out has been displayed, there is no crime of hijacking.

It is to be noted that the principle laid down in the phrase under discussion is wider than the concept of attempt, since the latter entails some sort of action being taken towards the goal, whereas the former does not necessarily carry such implications.<sup>7</sup>

<sup>1</sup> *I.C.A.O. Doc. 8565-LC/152-1*, p. 152, paragraph 50.

<sup>2</sup> *Ibid.*, p. 150, paragraph 35.

<sup>3</sup> See the statements made by the Secretary and the President of the Tokyo Conference, *ibid.*, p. 152, paragraph 53, and p. 153, paragraph 54 respectively.

<sup>4</sup> Above, p. 197.

<sup>5</sup> Chile suggested during the discussion of the provision that '... the text should be broadened so as to mention acts that manifested the intention to commit an offence'; *loc. cit.* (above, p. 195, n. 2), p. 177, paragraph 49.

<sup>6</sup> Above, pp. 197-8.

<sup>7</sup> See Mr. Kean's remarks at the Tokyo Conference: 'A threat could be made merely by speaking or by a gesture, but an attempt was something more than that and involved some sort of action along the road to the accomplishment of what had been threatened'; *ibid.*, p. 149, paragraph 27.

## HIJACKING COMPARED WITH PIRACY

In order to ascertain whether hijacking of aircraft amounts to piracy as defined by the Geneva Convention on the High Seas of 1958, it is necessary to compare it with piracy under the regime of that Convention. The Geneva Convention deals with the crime of piracy in Articles 15 to 21 inclusive. But the relevant provision for our comparison is Article 15, which defines piracy under international law. It provides:

Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of the article.<sup>1</sup>

The first point to be noticed is that the act constituting piracy could be an act of a member of the crew or a passenger. This is similar to the position under the Tokyo Convention, whereby any person on board can commit the offence of hijacking.<sup>2</sup>

Secondly, the act must involve the unlawful use of violence, detention or any act of depredation. Therefore, acts of violence, detention or depredation carried out according to the law of the flag for a lawful purpose, for example to restore the lawful command of another ship or to arrest someone on board such ship in accordance with the legal processes of the law of the flag, fall outside the orbit of article 15 of the Geneva Convention. In comparison with Article 11 (1) of the Tokyo Convention, this part of Article 15 of the Geneva Convention covers the concept of unlawful seizure or unlawful control of the aircraft embodied in the former. But it covers neither the element of a threat of force, nor that of interference envisaged in Article 11 (1) of the Tokyo Convention. Article 15 (1) of the Geneva Convention speaks of 'acts of violence' without mentioning threats of violence, or interference with the control of ships or aircraft.

The third constituent element of piracy is that illegal acts of violence, detention and depredation must be committed for private ends. The question may be asked: what are private ends? It can be argued that private ends are objectives sought for private reasons or gains, as opposed to public ones. For instance, the passengers or crew of a ship may steal, or take control of another ship, for their own private gains, without any political objectives and with no authority from their national State. It might be appropriate to cite Professor Johnson on this point:

By the early authorities . . . , piracy seems always to have been regarded as robbery or private warfare at sea carried on without a lawful commission.<sup>3</sup>

<sup>1</sup> For the text of the Convention, see *American Journal of International Law*, 52 (1958), pp. 842-51.

<sup>2</sup> See above, p. 195.

<sup>3</sup> 'Piracy in Modern International Law', *Transactions of the Grotius Society*, 43 (1957), p. 76. In this learned article, Professor Johnson deals with piracy in the light of leading cases on the subject, and discusses relevant articles of the 1956 Draft of the I.L.C. on the Law of the Sea.

The case of *The Santa Maria* in 1961, may also lend support to the view that 'private ends' means private gain. In that case,<sup>1</sup> the seizure of the ship by violence on the high seas was not recognized by the interested States, except Spain and Portugal, as a case of piracy, because of the political objectives of the actors.<sup>2</sup>

So, if the interpretation of the notion of 'private ends' under the Geneva Convention is to mean private gain, then the hijacking of aircraft for political motives is not covered by its Article 15 (1).<sup>3</sup> And it is submitted that none of the cases of hijacking of aircraft involve any act of violence or depredation of property on board aircraft for private gain.

On the other hand, it can be argued that 'private ends' do not necessarily mean private gain. The term 'private ends' may be interpreted to mean acts not authorized by a public authority or by a government. In its comments on its 1956 Draft on the Law of the Sea, the International Law Commission said, with regard to the motives of piracy:

(i) The intention to rob (*animus furandi*) is not required. Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain.<sup>4</sup>

Moreover, it may be difficult to distinguish between private ends and public ends. Professor Johnson may again be quoted. Citing with approval Dr. Lushington in the cases of *The Serhassan Pirates*<sup>5</sup> and *The Magellan Pirates*,<sup>6</sup> he goes on to say:

... it is practically impossible to distinguish between the private ends and the public ends of the persons concerned. True, the Serhassan pirates were acting for personal gain. But then they were also acting in defence of their own rather crude form of political organisation in the face of the expanding colonialism of the European Powers. This might reasonably be described as a sort of public purpose.<sup>7</sup>

So, it can be argued that hijacking of aircraft by some political groups, acting either in pursuance of their political aims, or in defiance of the political regime of the flag State,<sup>8</sup> may be said to be covered in this respect by Article 15 (1) of the Geneva Convention.

Another requirement for piratical acts under Article 15, paragraph 1 (a), of the Geneva Convention is that the act of illegal violence or detention must be directed, on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft. This requirement quite clearly excludes hijacking of aircraft from the scope of piracy under the Geneva Convention since, as has been seen above,

<sup>1</sup> This was a case of seizure of a Portuguese ship on the high seas by the Portuguese rebel leader Captain Galvao.

<sup>2</sup> See M. S. McDougal and W. T. Burke, *The Public Order of the Oceans* (1962), p. 822.

<sup>3</sup> See Waldock's comment on the notion of private ends in Article 15 (1) of the Geneva Convention: 'This excludes from piracy *jure gentium* . . . acts solely inspired by political motives. . . .' *The Law of Nations* (6th ed., 1963), p. 313.

<sup>4</sup> *I.L.C. Yearbook* (1956-ii), comment on Article 39, p. 282.

<sup>5</sup> (1845), 2 W. Rob. 345.

<sup>6</sup> (1853), 1 Spinks 81.

<sup>7</sup> See Johnson, loc. cit. (above, p. 199, n. 3), p. 78.

<sup>8</sup> A few cases illustrating these situations may be given: the hijacking of a Yugoslavian aircraft for political motives; the hijacking of some Cuban aircrafts by opponents of the regime of Dr. Castro; the hijacking of Israeli aircrafts by Palestinian Arabs; an American black nationalist freedom fighter hijacking a U.S. aircraft; the seizure of an Olympic Airways aircraft by men belonging to the 'International Commandos for Greece', which has been described by the hijackers as a part of a programme to sabotage the fascist regime in Greece. See p. 193, n. 1.



Article 11 (1) of the Tokyo Convention requires the offence of hijacking to be committed on board the aircraft itself, and not to be directed from the outside against the aircraft or its control.<sup>1</sup> Indeed, even under the regime of the law of the sea an act of the nature described by Article 15 (1) (a) is not piratical if committed by the crew or passengers of a ship against property or persons on board the ship itself. In the words of the International Law Commission:

(vi) Acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy.<sup>2</sup>

Again, this requirement precludes the application of Article 15, paragraph 1, of the Geneva Convention to the hijacking of aircraft under the Tokyo Convention: according to the former, the object of the actions is to be another ship or aircraft whereas, as has been seen, an act of hijacking has to be committed on board the aircraft itself.

It may be mentioned in passing that Article 15, paragraph 1 (b), of the Geneva Convention renders any of the acts described in Section (1) of the provision piratical, if committed against a ship, aircraft, persons or property in a place outside the jurisdiction of any State. This provision is no different from Subsection (a) of Article 15, except for its area of application, where it is intended to apply to 'an island constituting *terra nullius* or on the shores of an unoccupied territory'.<sup>3</sup>

It is to be noted that, while Article 15 (1) (a) specifically refers to actions against 'another ship or aircraft', Subsection (b) of the same provision does not use the same wording but simply says 'against a ship or aircraft . . .'. This may, perhaps, be construed to mean that a piratical act may be committed on board the same ship or aircraft, against property, persons or control of such ship or aircraft. This construction may make the subsection applicable to hijacking of aircraft. But it is submitted that this interpretation should be rejected, as it seems clear that the provision is intended to apply to acts generating from one ship or aircraft and directed against another, or against persons or property on board. Perhaps the drafting of the provisions is defective.

Thus it would appear that in so far as the offence of hijacking is concerned some of the constituent elements of piracy under the Geneva Convention are missing, and in particular the salient and uncontroversial element (acts must be directed against another aircraft and not against the aircraft itself or its control).

Therefore, it is submitted that hijacking of aircraft is not piracy under international law. Indeed, even the delegation which was the first to propose the insertion of a provision on hijacking in the Tokyo Convention (the United States delegation), expressly declared that it did not regard hijacking of aircraft as piratical acts. The United States representative said:

The legislation of his country provided for acts of piracy on the high seas, but these acts to which he was referring [hijacking of aircraft] did not come under the Convention

<sup>1</sup> Commenting on the concept of piracy under the 1956 Draft of the I.L.C. on the Law of the Sea, McDougal and Burke said: 'Presumably the Commission would exclude from piracy acts committed by crew or passengers aboard an aircraft above the high seas against crew or passengers'; op. cit. (above, p. 200, n. 2), p. 815, n. 247. See also Waldock, commenting on Article 15 (1) of the Geneva Convention: 'This excludes from piracy *jure gentium* . . . acts committed on board a ship or aircraft by the crew or passengers and directed against the ship or aircraft itself or persons or property on board'; op. cit. (above, p. 200, n. 3), p. 313.

<sup>2</sup> Loc. cit., above, p. 200, n. 4. No changes were made in the Commission's draft at the 1958 Geneva Conference on the Law of the Sea to indicate different provision on this point; McDougal and Burke, op. cit. (above, p. 200, n. 2), p. 822, n. 276.

<sup>3</sup> I.L.C. Yearbook (1956-ii), p. 282.

on the High Seas and, consequently, did not constitute piracy within the meaning given to that expression by the law at the present time. The Convention on the High Seas . . . stated concretely that the definition of piracy did not include acts committed on board a ship by the crew or passengers and directed against persons or property in the ship.<sup>1</sup>

The crime of hijacking is largely motivated by political considerations, and would have been completely outside the scope of the Tokyo Convention, according to its Article 2.<sup>2</sup> But the threat it poses to passengers, property, and the aircraft itself, brings it back within the orbit of the Convention.

It is suggested that there are some advantages to be gained, in the interests of civil aviation, from the contention that the crime of hijacking is not piracy under international law. They are:

1. Parties to the Tokyo Convention are under the obligation to allow the passengers and crew of a hijacked aircraft to continue their journey as soon as practicable;<sup>3</sup>

2. The aircraft and its cargo must be returned to the persons lawfully entitled to possession;<sup>4</sup>

3. Parties to the Tokyo Convention have undertaken to act in such a way as to avoid any unnecessary delay to the aircraft, passengers, crew and cargo.<sup>5</sup>

These advantages are not available under the regime of the law of the sea, and delay to passengers or cargo is a great hindrance to civil aviation.

#### SPECIAL TYPE OF PIRACY

Although it has been suggested above that hijacking of aircraft is not piracy under international law, a case can be made for regarding it as a special, perhaps a limited, type of piracy. This point of view can claim the following grounds in justification:

First, jurisdiction with regard to piracy *jure gentium* is vested in every State, which may seize a pirate ship or aircraft, arrest the pirates and try them.<sup>6</sup> Under the Tokyo Convention, a common jurisdiction, similar to that under the Geneva Convention in several aspects, may be said to exist. This point may be explained as follows: under the Tokyo Convention, two concurrent jurisdictions exist, namely the jurisdiction of the State of registration<sup>7</sup> and that of the State over-flown.<sup>8</sup> These are the only two

<sup>1</sup> I.C.A.O. Doc. 8302-LC/150-1, p. 149.

<sup>2</sup> Article 2 of the Tokyo Convention reads: 'Without prejudice to the provisions of Article 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorising or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.'

<sup>3</sup> The International Federation of Air Line Pilots Association (I.F.A.L.P.A.) has proposed the imposition of a ban on flights into States which do not permit the pilot of a hijacked aircraft to continue his journey within 48 hours. I.F.A.L.P.A.'s executive are determined to reduce the time limit to as little as 12 hours, if the country where a hijacker forces a landing shows no sign of co-operation; *The Times* (15 February 1969).

<sup>4</sup> See Article 11 (2); 'In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.'

<sup>5</sup> See Article 17 of the Convention: 'In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offence committed on board an aircraft the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo.'

<sup>6</sup> See Article 19 of the Geneva Convention on the High Seas, *American Journal of International Law*, 52 (1958), p. 846.

<sup>7</sup> Article 3 of the Convention.

<sup>8</sup> Article 4 of the Convention.

jurisdictions recognized under the Convention.<sup>1</sup> In contrast, Article 11, paragraph 1, gives 'Contracting States' the right to 'take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft'. The use of the plural in the provision, in addition to the lack of any geographical limitation on its application, indicates that this right is intended by the drafters to be exercised by every State party to the Convention. This right, it is submitted, resembles that of States under the Geneva Convention, although it is more limited in scope than the latter.

Secondly, as to the types of measures to be taken, both Conventions allow certain measures to be taken by States. But the measures authorized by the Geneva Convention are wider than those authorized by the Tokyo Convention. The latter empowers States to seize, arrest and take certain other measures necessary to preserve or restore control by the lawful command of the aircraft; and those measures may include the sending of fighter aircraft in order to intercept and force the hijacked aircraft to land, the blocking of a runway to prevent an aircraft from taking off, and forcibly removing the hijackers. However, there is no right to try the offenders, nor is there any right to determine the action to be taken with regard to the hijacked aircraft, except returning it to its lawful owners. Even so, the Tokyo rights involve the exercise of a large measure of executive jurisdiction,<sup>2</sup> as the action necessary to restore lawful command entails the use of coercive measures, which may include arrest, imprisonment and so forth.

Thirdly, the basis for the universal exercise of jurisdiction over piracy, as Professor Jennings put it, is

... the idea that the suppression of crime is an interest common to all States and to all mankind. The pirate is the obvious example of the *hostis humani generis*. . . .<sup>3</sup>

By the same token, the basis for the exercise of jurisdiction over hijacking of aircraft may well be the interest of the parties to the Tokyo Convention in the safety of civil aviation and the security of their national aircraft, persons, and property carried on board.

For these reasons it is submitted that a special, perhaps limited type of piracy has been created by the Tokyo Convention. After all, States have the power under international law to create any legal relationships among themselves, concerning any legal question. And the type of piracy suggested may easily be regarded as the result of the exercise of such power.

<sup>1</sup> For details, see the writer's Ph.D. thesis 'Jurisdiction over Crimes on Board Aircraft', submitted to the University of Cambridge, in August 1968, Chapter III, pp. 144 et seq. Professor D. H. N. Johnson's point of view is different; *Rights in Air Space* (1965), p. 79. See also Dr. F. A. Mann: 'The Doctrine of Jurisdiction in International Law', *Recueil des cours*, 111 (1964), p. 92. It is submitted that this is not the proper place to treat in detail the framework of jurisdiction under the Tokyo Convention.

<sup>2</sup> Jurisdiction under international law has been divided into several aspects by various authorities. Professor R. Y. Jennings divides it into 'executive jurisdiction, legislative jurisdiction, and curial or (judicial) jurisdiction'; 'The Limits of State Jurisdiction', *Nordisk Tidskrift for International Ret* 32 (1962), p. 212. Dr. B. Cheng divides jurisdiction into 'jurisdiction' and 'jurisdiction'; 'Crimes on Board Aircraft', *Current Legal Problems* 12 (1959), pp. 181-2. The American Law Institute divides jurisdiction into 'jurisdiction to prescribe' and 'jurisdiction to enforce'; *Second Restatement of the Law, Foreign Relations Law of the United States* (1965), p. 20.

<sup>3</sup> 'Extra-territorial Jurisdiction and the U.S. Antitrust Laws', this *Year Book*, 33 (1957), p. 156.



## CONCLUSION

It has been seen that the hijacking of aircraft is not piracy under international law. And this is all the better, since there are more gains to be drawn from the obligations of the parties to the Tokyo Convention than those under the Geneva Convention on the High Seas, 1958, particularly those relating to the speedy operation of civil aviation. Furthermore, the concept of hijacking, as has been seen, is wider than that of piracy, in that it applies to acts as well as manifested intentions to commit any unlawful interference with the control of the aircraft.

But until the Tokyo Convention comes into force,<sup>1</sup> the crime of hijacking is not subject to any rule of international law. However, it may be governed by municipal law, with all the resulting problems of conflict of jurisdictions or lack of jurisdiction. States, it is hoped, will soon realize the importance of the Tokyo Convention, 1963, and speed up the process of its ratification.<sup>2</sup>

<sup>1</sup> Article 21 requires ratifications to bring the Convention into operation. Since this note went to press, the Tokyo Convention came into operation on 4 December 1969. The following States are parties to it: China (Republic of), Italy, Norway, Philippines, Portugal, Sweden, the United Kingdom, Upper Volta, Denmark, Mexico, Niger and the United States of America. See *Press Release, I.C.A.O./557*, 11 September 1969, p. 3.

<sup>2</sup> It is interesting to note that Mexico has legislated specifically against the crime of hijacking of aircraft, making the hijackers liable to up to twenty years' imprisonment. This makes Mexico the first country to do so; *The Times* (12 December 1968).

## Addendum

Since this note went to press, the following further cases of hijacking occurred: a Continental Airlines DC-9, 27 July 1969, *The Times* (28 July 1969); a Mexican DC-6, 27 July 1969, *ibid.*; a Colombian airliner, *ibid.* (6 August 1969); an Ethiopian Airlines aircraft, 12 August 1969, *ibid.* (13 August 1969); an Olympic Airways DC-3, 17 August 1969, *ibid.* (18 August 1969); an Egyptian aircraft, 18 August 1969, *ibid.* (20 August 1969); a Trans-World Airlines jet, 29 August 1969, *ibid.* (30 August 1969); an Ecuadorian Air Force DC-3 transport, 7 September 1969, *ibid.* (8 September 1969); an Ethiopian DC-6, 13 September 1969, *The Observer* (14 September 1969); a Turkish Airline Viscount aircraft, 16 September 1969, *The Times* (17 September 1969); a Brazilian aircraft, 8 October 1969, *ibid.* (9 October 1969); an Argentinian aircraft, 8 October 1969, *ibid.*; a National Airlines aircraft, 10 October 1969, *ibid.* (11 October 1969); a Polish Ilyushin 18 aircraft, 19 October 1969, *ibid.* (20 October 1969); a Trans-World Airlines Boeing 707 to Italy (hijacked over California, stopping to refuel in Denver, New York, Bangor (U.S.A.), and Shannon (Eire)), 31 October 1969, *ibid.* (1 November 1969); a Nicaraguan aircraft, 4 November 1969, *Le Monde* (6 November 1969); a Brazilian aircraft, 4 November 1969, *ibid.*; an Argentinian BAC-111 (the hijacker subsequently persuaded to give himself up), 8 November 1969, *New York Times* (9 November 1969); an abortive attempt by a teenager to hijack a Delta jet, 10 November 1969, *The Times* (11 November 1969); a Chilean National aircraft (the hijacker overpowered by the crew), 12 November 1969, *International Herald Tribune* (13 November 1969); a Colombian DC-4 of Avianca Airline, 13 November 1969, *ibid.* (14 November 1969); a small Brazilian aircraft, 13 November 1969, *ibid.*; an American Army helicopter in South Vietnam (the hijacker arrested), 14 November 1969, *The Times* (15 November 1969); an aircraft of the Polish Airline Lot, 20 November 1969, *ibid.* (21 November 1969); a Brazilian Varig Airlines Boeing 707 (*en route* from Europe to South America), 29 November 1969, *The Observer* (30 November 1969); a Trans-World Airlines jet, 3 December 1969, *International Herald Tribune* (4 December 1969); a South Korean K.A.L. turboprop aircraft (claimed by N. Korea to have been hijacked by the pilots), 12 December 1969, *ibid.* (13-14 December 1969); an abortive attempt to hijack an Ethiopian Airlines Boeing 707 (the would-be hijackers killed by Ethiopian security police on board), 12 December 1969, *The Observer* (14 December 1969); a Chilean Boeing 727, 19 December 1969, *La Tribune de Genève* (20-1 December 1969, p. 28); a United Airlines Boeing 727, 28 December 1969, *International Herald Tribune* (29 December 1969).

# PUFFENDORF-CRULL AND THE AFRO-ASIAN WORLD\*

By PROFESSOR C. H. ALEXANDROWICZ

Samuel Puffendorf (1632–94) who, like Grotius, was for some time a member of the Swedish diplomatic service and later became professor at the Universities of Heidelberg and Lund, completed his main work on the *Law of Nature and Nations* in 1672. Ten years later he brought out the first volume of the *Introduction to the History of the Principal States of Europe* and further volumes (II–III) appeared in the next few years.<sup>1</sup> This impressive treatise on European affairs was later extended to other continents constituting an *Introduction to the History of Asia, Africa and America*. The full title of this volume in German is: 'Einleitung zu der Historie der vornehmsten Reiche und Staaten von Asia, Africa und America welche nach dessen Methode ein gelehrter Engelländer kürztlich abgehandelt und beschrieben. Anjetzo aus dem Englischen ins Hoch-Teutsche übersetzt'.<sup>2</sup>

The title would seem to indicate that the volume on the history of the Afro-Asian world (with an extension to the American continent) was written by an English author and was only later translated into German, becoming Part IV of Puffendorf's world history. The translator states, however, that the author had followed Puffendorf's method of writing history. Puffendorf had treated his subject not only from the point of view of general history but also from the point of view of the theory of the State and inter-State relations. The translator admits that he does not know who wrote the original text of volume IV but he believes that it was Jodocus Crull.<sup>3</sup> National biographical inquiry has in fact referred to the authorship of Crull<sup>4</sup> and a few words about him would be relevant in throwing some light on this partnership in history writing. This is particularly of interest to historians of the family and law of nations, as we are here faced with the first work on the history of universal inter-State relations covering all continents, civilizations and various types of State formation, making its appearance within the framework of Puffendorf's treatise.

Jodocus Crull was a native of Hamburg. Neither the date of his birth nor the date of his death is exactly known.<sup>5</sup> But it seems certain that he went as a student from

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<sup>1</sup> *Allgemeine Deutsche Biographie* (1888), vol. 26, p. 705. According to this Biography volumes III and IV are a continuation of the work, added by other authors.

<sup>2</sup> The dates of the various volumes extend from 1730 to 1733 (Brit. Mus. Library).

<sup>3</sup> Preface to vol. IV, p. 173. Another edition of this volume (publ. in Frankfurt in 1706, see National Library in Vienna) contains a preface by the translator who refers to J. Crull in the following words: 'Was das Absehen dieses Werkes sey . . . erhellet gleich aus der ersten Seite dieses Buches; Wer aber der Autor welcher es verfertigt kan ich nicht gewiß sagen maßen es demselben nicht gefallen seinen Nahmen beyzufügen; muthmaße aber daß es eben derjenige seyn möchte welcher die Einleitung zu der Historie von Europa so weylant Herr Samuel Freyherr von Puffendorf heraus gegeben in Englischer Sprache continuiert hat und sich J. Crull nennet. Es ist aber selbiges Werck so wohl als dieses erstlich vor einem Jahr oder anderthalb nemlich zu Ende des 1705ten Jahrs ans Licht gekommen. Den Fleiß welchen der Autor bey demselben angewendet wirstu aus dem Wercke selbst beurtheilen können; die Ordnung aber die er darin gehalten aus beygefüger Vorrede also fort sehen.'

<sup>4</sup> *Dictionary of National Biography* (J. Crull).

<sup>5</sup> It is probable that J. Crull died about 1712 or 1713; *Notes and Queries*, 6th series, vol. III, p. 231.

Hamburg to the Netherlands and obtained in 1679 a Doctorate of Medicine at the University of Leyden. The *Biographical Dictionary of Hamburg Writers* (edited by Hans Schroeder) refers to his medical dissertation (Theod. Craanen, Lugd. Bat. 1679, 4) and states that he died as a medical student in the Netherlands.<sup>1</sup> However, this information is not correct. We know that he came to England and took in 1681 the degree of Doctor of Medicine at the University of Cambridge.<sup>2</sup> He was elected in the same year a Fellow of the Royal Society and eleven years later became a licentiate of the College of Physicians (1692). His English biographer states, however, that he had little success in medical practice and took to writing in a field remote from medical science, namely history and overseas exploration.<sup>3</sup> Our attention is drawn to translations which he made for some publishers in England. It is here that his interest in Asia appears first. His translation of Dellon's *Voyage to the East Indies* (from the French) appeared in London in 1698.

In the Preface to this work Jodocus Crull addressed the following words to Samuel Sheppard, Sheriff-elect for the City of London and County of Middlesex:

Sir, when I saw so considerable a part of the Nation joined in the design of settling the East India Trade upon a new Foundation, I thought I could scarce pitch upon a more seasonable juncture than this, to make my author(s) appear in England, to give us an account of their ten Years Transactions, among some Nations, where in all probability our Indian Trade is to be carried on to the Honour and Advantage of the English Nation. I will not pretend to enlarge myself here upon the usefulness of Commerce in General, or of that of the Indies in Particular; if the station I am in did not excuse me from undertaking that task, the *universal consent of all civilised Nations*, who look upon traffick as one of the main Pillars of the prosperity of the Common Wealth, is a demonstration sufficient to over-balance any thing that can be said upon so ample a subject by a private hand. And as to what relates to the Indian Trade in particular, our Neighbours the Dutch, who have made it the foundation stone of the present flourishing state of their Common Wealth, are living instances, to convince us what improvements may be made in this kind, if managed by a dextrous hand. I might in this place have made some Reflections, perhaps not altogether useless upon the present condition of some of the Indian Countries, especially upon those on the Coast of Malabar who being divided into so many . . . Principalities, and for the most part situated very convenient for Traffick, *seem to invite us to be sharers* with them in the vast advantages the East Indian Trade affords. . . .<sup>4</sup>

Jodocus Crull then speaks about the arrival of the Indian travellers in England and he recommends them to the Sheriff. He makes a reference to the English East-India Company and its activities in the East. This Preface is signed: 'J.C. Med.D.' It is quite clear that Crull had taken an active interest in the East Indies and the idea of continuation (or translation) of Puffendorf's work must have taken shape, leading to arrangements with London publishers.<sup>5</sup>

<sup>1</sup> Dr. Hans Schroeder (editor), *Lexikon der Hamburger Schriftsteller bis zur Gegenwart* (1851), No. 688, p. 608. It may be that J. Crull was of Dutch origin.

<sup>2</sup> *Graduati Cantabrigienses* (1823), p. 125 (M.D. *per Literas Regias*, 1681).

<sup>3</sup> *Dictionary of National Biography* (J. Crull).

<sup>4</sup> Italics are mine. Among other translations by J. Crull are Puffendorf's *Of the Nature and Qualification of Religion in reference to Civil Society* (1698); Puffendorf's *Introduction* (1699, 1702, 1706, 1719); J. Bouvet's *The Present Condition of the Muscovite Empire . . . with the Life of the Present Emperour of China* (1699). Crull's other publications include works about Russia and Denmark and Westminster Abbey. See *Dictionary of National Biography and National Library* (Vienna M. 18367, 18374, 18375).

<sup>5</sup> The Cambridge University Library has the sixth edition of the *History of the Kingdom and States of Asia, Africa and America, both Ancient and Modern*. This volume was printed by James, John and Paul Knapton at the Crown in Ludgate St. in 1736. The writer of the Preface to this



The author explains in the Preface to volume IV some of the details of his research into Afro-Asian history. Among the sources were not only some of the existing treatises on Asian, African or American history, but also memoirs of travellers and accounts published in newspapers.<sup>1</sup> What strikes the reader above all is the masterly classification of the material and the choice of events which were important to historians and to students of the law of nations. The work is divided into three main parts (Asia, Africa, America),<sup>2</sup> of which the most important is the part devoted to the East Indies. The most interesting section in this part is the description of diplomatic activity and treaty-making which reflected the progress of the Christian-Islamic struggle. Thus the author writes about the sixteenth-century embassies sent by the Shah of Persia to Europe in order to cement an alliance against the Ottoman Empire. In particular the Embassy of Shah Abbas to Emperor Rudolph in Prague is singled out (we know that it was led by an Englishman in Persian service, Sir Anthony Shirley).<sup>3</sup> Other notable diplomatic missions were those sent by Persia to France (e.g. the Embassy of Mehemet Riza Beck in 1715) and the Turkish Embassies to European capitals,<sup>4</sup> sent whenever the Court in Constantinople exceptionally decided to make use of the active right of legation which at first was considered irreconcilable with the tradition of the great Asian Empires. The Embassy of Sir William Norris to the Mogul Emperor Aurangzeb (1701) is mentioned and the author emphasizes some of the objectives of this embassy, i.e. to give support to the newly created English East-India Company which was to replace the former Company.<sup>5</sup> The author refers to the isolationist policy of China and Japan but he does not fail to mention the role of the Jesuit-astronomers at the Court of Peking and the mission of St. Francis Xavier, the Apostle of Japan in the sixteenth century.<sup>6</sup>

In the chapter on Africa<sup>7</sup> reference is made to the Barbary States, the commercial treaty-making with Morocco in the eighteenth century, to problems of Turkish suzerainty in North Africa, to Ethiopia and Mauretania.<sup>8</sup> The author also collected information on some of the remote African kingdoms which entered the world political scene only later in the nineteenth century. Thus he speaks about King Monomotapa, Guinea, Sierra Leone and Benin.<sup>9</sup> The activities of the Portuguese, English and French in Africa are referred to. In the last chapter the author concentrates on two American

edition refers to Puffendorf's *History of Europe* and adds: 'The design of the present Undertaking, how far soever it may fall short of the other's excellency, is to do the same in respect to the Histories of Asia, Africa and America so far as the circumstances of things and revolutions of time would possibly allow it.'

<sup>1</sup> Among the works quoted are: *Rerum Persicarum Historia* by Bizarus; *Le Grand théâtre historique ou nouvelle histoire universelle tant sacrée que profane* (Leyden, 1703); and the *Travels of Thevenot and Tavernier as well as the Account of Japan and Formosa* by George Psalmanaazaar who was born in the East 'aber allhier in England sich befindet' (copy in the National Library, Vienna, Preface).

<sup>2</sup> Part I (Asia) contains thirteen chapters: Jewish History (I), the Assyrian Monarchy, Babylon (II), the Empire of the Medes, Cyrus (III), the Persian Empire (IV), China (V), Japan and Formosa (VI), Tartary, Chingis Chan (VII), the Mogul Empire (VIII), the Kingdom of Syria (IX), Troy, Lydia and Pergamos (X), the Turkish Empire, Cyprus (XI), the Kings of Edom (XII), Arabia, the Caliphs (XIII); Part II (Africa) contains six chapters: Egypt (I), the Commonwealth of Carthage (II), the Cheriffs of Africa, Fez, Morocco (III), the Kingdom of Numidia, Lybia, Mauretania (IV), Tunis (V) and Ethiopia, Guinea (VI); Part III (America) contains two chapters: Mexico (I) and the Incas of Peru (II).

<sup>3</sup> *Introduction to the History of Asia, Africa and America*, vol., p. IV, 352.

<sup>4</sup> e.g. to France (1715) or to Vienna (1719/20), *ibid.*, p. 610.

<sup>5</sup> *Ibid.*, p. 445.

<sup>6</sup> *Ibid.*, pp. 423, 428.

<sup>7</sup> *Ibid.*, pp. 754-803.

<sup>8</sup> *Ibid.*, pp. 784, 787, 803.

<sup>9</sup> *Ibid.*, pp. 818, 821, 822.

State entities: the Incas (Peru) and Aztecs (Mexico).<sup>1</sup> One of the main sources on the Spanish-American confrontation known to him is the work of Garcilasso de la Vega.

The volume on Asia, Africa and America which after its translation into German was included in Puffendorf's world history,<sup>2</sup> appears as one of the significant works in the series of classic writings which deal with the development of the family and law of nations outside Europe.<sup>3</sup> The first two major works in this group in the seventeenth century were Grotius's *Mare Liberum* and Seraphim de Freitas's *De Justo Imperio Lusitanorum Asiatico*. In the eighteenth century some of the writings of Surland, Justi, Vattel and Martens<sup>4</sup> were further contributions to the classic literature which testify to the interest which many writers showed in the early development of the family and law of nations in all parts of the world. Puffendorf's *Introduction to History* appeared in the second half of the eighteenth century in French. An edition in eight volumes was brought out by M. Bruzen de la Martinière under the title *Introduction à l'histoire moderne, générale et politique de l'univers* covering Europe, Asia, Africa and America.<sup>5</sup> The extension of Puffendorf's original European history to other continents and civilizations is a logical expression of his 'natural law' approach to the law of nations which is conceived as an inherently universal and non-discriminatory system of law.<sup>6</sup>

<sup>1</sup> *Introduction to the History of Asia, Africa and America*, vol. IV, pp. 823-998.

<sup>2</sup> Puffendorf is one of the classic writers who in spite of his naturalist ideology had a significant appeal in England, for he was one of the first writers of the period of enlightenment who proposed some of the most progressive principles of law and politics (the natural equality of States and the denial of despotism in any form).

<sup>3</sup> The volumes of Puffendorf's *Introduction to the History of Europe* were translated into English by J. Crull; he wrote a Dedication to these volumes which reads as follows: 'To His Excellency Charles Duke of Shrewsbury, H.M. Principal Secretary of State etc.: Sir, I should scarce have had the boldness to prefix your great name to this Book, had I not been fully persuaded that the extraordinary worth of my author would strongly plead for me to your Excellency's generosity. For, since my intention was that the Sieur Puffendorf's *Introduction to the History of Europe* should appear in no less Lustre in this Kingdom, than it has heretofore done in most Parts of Europe, I could not . . . submit his Treatise to the Protection of any other Person than your Excellency whose judging power is so universally acknowledged: If it endures this test, it must pass current in this Nation . . . J. Crull M.D.' The relevant volumes available in the Cambridge University Library bear the dates of 1697, 1706, 1719 and 1729.

<sup>4</sup> C. H. Alexandrowicz, *Introduction to the History of the Law of Nations in the East Indies in the 16th, 17th and 18th centuries* (1967).

<sup>5</sup> *Introduction to the History* . . . begun by Baron Puffendorf, continued by M. de la Martinière, improved by Joseph Sayer, Serjeant at Law, 1764. The dates of the volumes in French are 1753-64. An earlier Amsterdam edition is in the *Bibliothèque Nationale* in Paris, G. 12769-70; see also G. 12691, 12698-9, 12771.

<sup>6</sup> Dr. S. Sieber, *Samuel Puffendorf, Staatsdenker, Bahnbrecher und Kämpfer* (1938). See also L. Krieger, *The Politics of Discretion: Puffendorf and the Acceptance of Natural Law* (1965); but *quere* statement on p. 183.

# PASSPORTS ISSUED BY SOME NON-STATE ENTITIES\*

By DANIEL C. TURACK

*Professor, Franklin Law School of Capital University, Columbus, Ohio*

On first blush the reader might think that the term 'non-State entities', used in the title, will lead him to a discussion on passports issued by international organizations. Although international organizations have an international juridical personality and are non-State entities, they do not issue passports.<sup>1</sup>

In this Note we shall look at the position of three passport-issuing non-State entities which either at present enjoy, or have enjoyed, recognition as subjects of international law, namely, the former internationalized territory the Free City of Danzig,<sup>2</sup> the Holy See<sup>3</sup> and the Sovereign Military Order of St. John of Jerusalem, of Rhodes and of Malta.<sup>4</sup>

## THE FREE CITY OF DANZIG

When the Treaty of Versailles came into force on 10 January 1920 the Free City of Danzig was created,<sup>5</sup> thereby ensuring Poland's access to the sea. Article 104, paragraph 6 of the Treaty stated:

The Principal Allied and Associated Powers undertake to negotiate a Treaty between the Polish Government and the Free City of Danzig, which shall come into force at the same time as the establishment of the said Free City, with the following objects:

6. To provide that the Polish Government shall undertake the conduct of the foreign relations of the Free City of Danzig as well as the diplomatic protection of citizens of that city when abroad.

On 9 November 1920 the envisaged Treaty was concluded at Paris by Poland and the Free City of Danzig.<sup>6</sup> Article 2 of this Treaty provided:

Poland shall undertake the conduct of the foreign relations of the Free City of Danzig

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<sup>1</sup> Details concerning the travel document issued by the United Nations are discussed by M. Brandon, 'The United Nations Laissez-Passer', this *Year Book*, 27 (1950), pp. 448-55. For information concerning travel documents issued by regional international organizations see the present author's contribution, 'International Regional Organizations and their Travel Documents', *Canadian Yearbook of International Law*, 6 (1968), p. 164.

<sup>2</sup> On the legal status of the Free City of Danzig see I. F. D. Morrow, 'The International Status of the Free City of Danzig', this *Year Book*, 18 (1937), pp. 114-26; M. Ydit, *Internationalized Territories* (1961), pp. 185-230.

<sup>3</sup> On the legal status of the Holy See see M. Falco, *The Legal Position of the Holy See before and after the Lateran Agreements* (1935); H. F. Cumbo, 'The Holy See and International Law', *International Law Quarterly*, 2 (1948-9) pp. 603-20; J. L. Kunz, 'The Status of the Holy See in International Law', *American Journal of International Law*, 46 (1952), pp. 308-14.

<sup>4</sup> On the legal status of the Order of Malta see A. C. Breycha-Vauthier, 'The Order of St. John in International Law', *American Journal of International Law*, 48 (1954), pp. 554-63; C. d'Olivier Farran, 'The Sovereign Order of Malta in International Law', *International and Comparative Law Quarterly*, 3 (1954), pp. 217-34; C. d'Olivier Farran, 'The Sovereign Order of Malta: A Supplementary Note', *ibid.*, 4 (1955), pp. 308-9; *Nanni v. Pace and the Sovereign Order of Malta*, *Annual Digest*, 1935-1937, No. 2.

<sup>5</sup> Section XI, Articles 100-8 of the Treaty of Versailles.

<sup>6</sup> *League of Nations, Treaty Series*, vol. 6, p. 190; *British and Foreign State Papers* (1920), vol. 113, p. 965. The Treaty entered into force on 15 November 1920.



as well as the protection of its nationals abroad. This protection shall be assured in the same conditions as the protection of Polish nationals.

Passports issued to nationals of Danzig will not assure them Polish protection unless they have been visaed by the representative of the Polish Government at Danzig.

In the first years of the existence of the Free City, Danzigers received a Danzig passport issued initially and renewed, when the holder was in their territory, by the authorities of the Free City. When abroad, however, Danzigers had to rely upon Polish consuls and diplomatic representatives for new passports or renewal of their expired passports. These Polish representatives, acting pursuant to orders from their Ministry of Foreign Affairs, withdrew the Danzig passports presented, and issued the Danzigers with Polish passports. Danzigers in Poland were also compelled to exchange their Danzig passports for Polish passports if a new passport or renewal was sought. Understandably, these practices led to much friction between Danzig and Poland. The Free City wanted the Polish diplomatic and consular representatives to renew or issue a new Danzig passport to Danzigers instead of giving them Polish passports. Danzig, of course, wanted to insist on this procedure as an expression of its independence. Moreover, Danzig passports were accepted by foreign governments without a visa<sup>1</sup> which was not true for holders of Polish passports. On the other hand, the Polish Government maintained that a Polish passport was essential for Danzigers in order to render protection.<sup>2</sup> It may be added that the Free City had to undertake, at the insistence of the Polish Government, not to allow Polish nationals to cross the Danzig frontier to or from the sea, or to or from Germany, unless they possessed a passport for foreign travel entitling them to leave or enter Poland.<sup>3</sup>

On 24 October 1921, at Warsaw, Danzig and Poland signed the Agreement<sup>4</sup> for the purpose of executing and completing the Polish-Danzig Treaty of 9 November 1920. Article 27 of the Agreement stipulated:

The Polish Government and the Government of the Free City shall institute negotiations as soon as possible with regard to the manner in which Polish authorities, and in particular Polish consulates, shall co-operate in the issue of passports to nationals of the Free City living in foreign countries.

The High Commissioner for the Free City appointed by the League of Nations, Mr. M. S. MacDonnell, acting in the capacity of arbitral functionary, outlined the problems in depth in his Decision of 28 January 1924.<sup>5</sup> He decided that:

(a) The authorities of the Free City are entitled to issue Danzig passports to their own citizens at home or abroad and no Danzig citizen can be compelled against his will to take a Polish passport instead of, or in addition to, his Danzig passport.

<sup>1</sup> The waiver of the visa requirement by foreign governments for holders of Danzig passports was probably due to the practice of the Free City's authorities in not requiring a visa for entry into its territory by all foreigners. In this practice, the Free City was years ahead of most members of the international community. This liberal attitude by Danzig was challenged by Poland which wanted the Polish visa attached to the passports of foreigners intending to enter Danzig territory. This matter led to a conflict which was resolved in favour of Danzig's attitude in the High Commissioner for Danzig's Decision rendered 30 August 1921, *Decisions of the High Commissioner, League of Nations, Free City of Danzig* (1921), pp. 19-23. I might add that Poland also objected to the Free City's authorities permitting foreigners without passports easy access to its territory; see the High Commissioner's Decision of 16 December 1921, *ibid.*, p. 62, § vi.

<sup>2</sup> *Ibid.* (1924), p. 14.

<sup>3</sup> Article 26 (1) of the Agreement of 9 November 1920.

<sup>4</sup> *League of Nations, Treaty Series*, vol. 116, p. 5; *League of Nations, Official Journal* (1924), p. 891. The Agreement entered into force on 10 January 1922.

<sup>5</sup> *Decisions of the High Commissioner, League of Nations, Free City of Danzig* (1924), pp. 8 et seq.

(b) In order to enable Polish Consulates or Diplomatic Representatives abroad to recognize the Danzig passport the Free City will supply the Polish Commissioner General at Danzig with as many cancelled specimens of the Danzig passport as may be required for circulation amongst the Polish Consulates and diplomatic representatives abroad, as well as with a statement of the conditions under which the Free City issues passports to its citizens.

(c) In order that Danzig citizens abroad may be able to claim Polish protection under Article 2 of the Treaty of Paris the authorities of the Free City will be entitled if they so desire to send a passport, before issue to its holder, to the Polish Commissioner General at Danzig for a visum, and any Danzig citizen abroad will be entitled to obtain the visum of a Polish Consulate or diplomatic representative on presentation of a valid passport duly issued by the authorities of the Free City.

(d) The fees to be charged Danzig citizens for the visum are the same as to Polish Nationals and will pass to the Polish Treasury.<sup>1</sup>

Poland launched an appeal from the High Commissioner's Decision to the Council of the League of Nations but was unsuccessful. Subsequent negotiations between Warsaw and Danzig resulted in the conclusion of an Agreement on 4 May 1924 relative to the issue of Danzig passports to Danzig citizens abroad,<sup>2</sup> which replaced that portion of the Decision apposite to the issuance of passports to Danzig nationals. Under the Agreement, Danzig authorities were responsible for all formalities connected with the issue and renewal of passports to Danzigers both at home and abroad. Danzig passports could be handed out abroad by Polish consuls and diplomatic representatives at the request of the authorities of the Free City if such request were accompanied by the Danzig regulations pertaining to the issue of passports and the passports were transmitted to the Polish diplomatic representative in Danzig.<sup>3</sup>

Polish consuls or diplomatic representatives abroad were authorized to issue or renew a Danzig passport if the applicant produced a valid certificate of identity (*Heimatsschein*) or presented a passport which expired within the last three months. A procedure of inquiry was outlined in case of the applicant's inability to satisfy the Polish representative as to his identity. On the other hand, if the applicant presented grounds of urgent circumstance and could present some proof of his Danzig nationality, the Polish representative was empowered to issue the applicant a Danzig passport with three months' validity<sup>4</sup> which could not be renewed or extended (*weder auf eine weitere noch auf eine ausschließende Zeit verlaengert*). Whenever one of these

<sup>1</sup> Ibid., p. 14.

<sup>2</sup> *Zusammenstellung der zwischen der Freien Stadt Danzig und der Republik Polen abgeschlossenen Verträge, Abkommen, und Vereinbarungen* (1924-7), p. 105 (cited hereinafter as *Zusammenstellung*). An English translation is found in *British and Foreign State Papers* (1924), vol. 120, p. 227. For the most part the Agreement proved effective. However, a complaint was directed to the High Commissioner on 7 April 1931 concerning the use of German texts without adequate Polish translations sent to the Polish consulates and embassies abroad which resulted in a further Agreement on 5 August 1933, *Zusammenstellung* (1933-4), pp. 262 et seq. It was agreed that the Polish offices in foreign countries would draw up passports to be given to Danzig nationals, in German, and that translations would not be appended to the German text without previous agreement with the Danzig authorities. However, an indication in Polish was to appear on the fourth page of the passport, of the authority by which the passport was issued.

<sup>3</sup> Poland gave its diplomatic representative in Danzig the title of 'Poland's Commissioner General for Danzig (*Commissaire général de la République de Pologne auprès de la Ville Libre*)'.

<sup>4</sup> Prior to the 1926 Geneva Passport Conference, the ordinary Danzig passport was valid for two years and renewable for a similar duration. After the Conference the initial validity of the Danzig passport was made five years, renewable for another five years. In fact, the Danzig authorities gave the widest possible application to the Conference's recommendations; see League of Nations Doc. C. 356. M. 241. 1937. VIII, Addendum, 20 August 1938, pp. 4-5.



short-term passports was issued, the authority of the Free City had to be informed immediately through the Polish diplomatic representative in Danzig and furnished with details including the number of the passport and a photograph of the bearer. If subsequent to the issue of this short-term passport, it was shown that the bearer was not a Danzig national, the Polish authorities had to take all necessary measures to withdraw the passport.

Fees for the issue of the Danzig passport by Polish representatives went to the Polish treasury and were equivalent in amount to that paid by Polish nationals for a Polish passport. The Polish diplomatic representative in Danzig was responsible for informing the Free City authority at the first opportunity, but not later than the end of each month, of the number of Danzig passports issued abroad at Polish consulates and diplomatic posts, submitting their numbers, photographs and details concerning the bearer. Any invalid, expired or handed-in Danzig passport was to be returned to the Free City authority through the Polish diplomatic representative in Danzig. Lastly, the question of protection for Danzig nationals whilst abroad was excluded from the Agreement.<sup>1</sup>

Danzig passports were recognized universally at least till 1 September 1939, the date on which the Free City was reannexed to Germany. On this date, Germany enacted the Law concerning the Reunification of the Free City of Danzig with the German Reich, thereby imposing German nationality upon the Free City's nationals, a move which later caused untold hardships to these people.<sup>2</sup> The military occupation of the Free City by Germany was not recognized by the Western Allies after the war. In accordance with the Potsdam Declaration, the Free City has been placed under Polish administration until final disposition is arranged in a Peace Treaty.

Although the City State still exists in law, no Danzig passports have been issued since Danzig was liberated by the Russians in March 1945. The Danzig dilemma is similar to the situation of the Baltic States, Estonia, Latvia and Lithuania; however, in the case of the Free City there are no diplomatic or consular representatives to issue Danzig passports. While the passports issued by representatives of the Baltic States continue to be recognized by those countries which do not recognize the Soviet Union's annexations of 1940, the question of whether Danzig passports would be recognized appears almost academic. A bearer of an expired Danzig passport who professes to be a Danziger should be admitted into those countries which recognize the present Polish control over the territory of the Free City as only a temporary measure awaiting final international resolution.

#### THE HOLY SEE AND THE VATICAN CITY STATE

On 11 February 1929 the Holy See and Italy signed the Lateran Treaty<sup>3</sup> whereby Italy ceded territory to the Holy See, which territory became the State of the City of the Vatican and constituted the territorial sovereignty of the Holy See. With respect to freedom of movement, the Treaty established that diplomatic representatives and envoys of the Holy See, diplomatic representatives and envoys of nations to the Holy

<sup>1</sup> Danzigers received Polish protection abroad if their passports carried a Polish visa attached by the Polish diplomatic representative in Danzig in accordance with Article 2 of the Treaty of Paris.

<sup>2</sup> See *Re Kruger* (1951), I.L.R. 1951, Case No. 68; *In re Nix et al.* (1951), I.L.R. 1951, Case No. 69 with Note; *In re Wetzel* (1956), I.L.R., 24 (1957), p. 434.

<sup>3</sup> An English translation of the text of the Treaty is found in *American Journal of International Law*, 23 (1929), *Supplement*, p. 187; J. W. Wheeler-Bennett, ed., *Documents on International Affairs*, 1929 (1930), p. 216. The Treaty entered into force on 7 June 1929.



See, and dignitaries of the Church coming from abroad directly to the State of the Vatican could proceed through Italian territory to the State of the City of the Vatican if they possessed passports issued by the countries from which they came and visas issued by Papal representatives abroad. The same rights would apply to these persons when they left the Vatican City for foreign parts if they possessed a regular Papal passport.<sup>1</sup> Furthermore, during a vacancy in the Papal See, the Treaty imposed an obligation on Italy to take special care to prevent any obstacle to the free access of Cardinals to the Vatican, or to their passage through Italian territory; and to ensure that there should be no hindrance to or interference with their personal liberty.<sup>2</sup>

The same conditions apply to conclaves which may be held outside of the State of the City of the Vatican and to councils presided over by the Sovereign Pontiff or his legates, and include in their purview the Bishops summoned to take part in the council.<sup>3</sup> Italy was also obliged to permit the free access of Bishops from all parts of the world to the Apostolic See.<sup>4</sup>

The State of the City of the Vatican enjoys most but not all of the attributes of a sovereign State.<sup>5</sup> In exercise of one of the rights of a State, the Act of 7 June 1929 Relative to Citizenship and Sojourn<sup>6</sup> was enacted and the Governor of Vatican City passed an Ordinance on 8 June 1929<sup>7</sup> containing regulations to supplement the Act. Under the Act, Vatican citizens,<sup>8</sup> other than Cardinals residing in the Vatican City or in Rome, their suites, the Governor of the Vatican City and other specifically named persons, are issued with an identity card by the Governor which must be presented on entry and exit from the Vatican City.<sup>9</sup> In the 1930s, when the passport was needed for travel to most European countries, foreigners could visit the Vatican from 6.00 a.m. to 11.00 p.m. if they presented their national passport duly visaed by the competent authorities of the Vatican City.<sup>10</sup> Today, a bona fide visitor to the Vatican City is no longer required to present a national passport to gain entrance or exit from the State.

The State of the City of the Vatican is a subject of international law distinct from the Holy See which enjoys a similar status. It is a customary rule of international law that a State will recognize the passports issued by another State to its own citizens. Consequently, States which recognize the Vatican City as a State will also recognize its passports. On the other hand, the Vatican City has issued passports since its establishment on 11 February 1929, that is, from the time of the signing of the Lateran Treaty and before the Treaty entered into force, the formal birth date of the Vatican City. The Papal passports issued in these circumstances were recognized by other States. States also recognized the Papal passport prior to 7 June 1929 on the basis of the international juridical personality of the Holy See. Similarly, the Papal passport was recognized prior to the conclusion of the Lateran Treaty because of the permanence of the Holy See as a subject of general international law *vis-à-vis* all States. If existence of the Vatican City State was to cease, the Papal passport would continue to

<sup>1</sup> Article 19.

<sup>2</sup> Article 21 (2).

<sup>3</sup> Article 21 (4).

<sup>4</sup> Article 12 (3).

<sup>5</sup> On the legal status of the City of the Vatican see G. Ireland, 'The State of the City of the Vatican', *American Journal of International Law*, 27 (1933), pp. 271-89.

<sup>6</sup> United Nations Legislative Series, *Laws Concerning Nationality* (United Nations Doc. ST/LEG/SER. B/4, July 1954. United Nations Publication, 1954, V. 1), p. 542.

<sup>7</sup> *Acta Apostolicae Sedis, Supplemento per le leggi e disposizioni dello Stato della Città del Vaticano* (1929), pp. 14 et seq. and pp. 31-2.

<sup>8</sup> Vatican citizenship laws are unique when compared with citizenship laws of other countries, above, n. 6 on this page.

<sup>9</sup> Chapter 1, section 11.

<sup>10</sup> E. Reale, *Manuel pratique des passeports* (1931), p. 44.

be issued and recognized by virtue of the continuation of the Holy See although it would no longer be issued under the authority of the State of the City of the Vatican, that is, there would be a return to the position prior to 11 February 1929.

According to present regulations, Vatican citizens may request a passport for travel abroad (*passaporto per l'estero*), from the Governor's Office, indicating the purpose and destination of their trip. Authorization for issuing the passport is granted by the Pontifical Commission for the Vatican City after approval, if deemed necessary, by the Pontiff. In addition to the aforementioned title of the document, the brown leather cover also bears the words *Stato Della Città Del Vaticano* (the State of the City of the Vatican) and the crossed keys of St. Peter, the first Pope, surmounted by the triple Papal tiara. The Vatican passport is distinctive from the passports of other States in that it does not contain the usual request in the name of the chief executive of the State to allow the bearer to pass freely and render him any assistance or protection which he may need. All details in the Vatican passport are in Italian. The Vatican passport is also a family passport in that children under sixteen years of age may have their particulars and photographs included, but the wife of the bearer would require a separate passport. Children inscribed in the Vatican passport must accompany the bearer and cannot use the passport for travel without the bearer.

#### THE ORDER OF MALTA

The Sovereign Military Order of St. John of Jerusalem, of Rhodes and of Malta, commonly called 'The Order of Malta', has enjoyed an international juridical personality for almost one thousand years. Although the powers and prerogatives of the Sovereign Order are neither equivalent to those of a sovereign State nor commensurate with those of the Holy See, it is an international person with a passport-issuing capacity.

All of the Order's passports are diplomatic ones and are issued to diplomats representing the Order; Presidents of National Associations of the Order; members of royal families who are also members of the Order; persons who are carrying out a special diplomatic mission for the Order, including their wives, and other persons worthy of special consideration. Passports are issued from the Grand Magistracy located in Rome by the Grand Chancellor.

The passport is of red leather with the white Cross of Malta and the words 'Diplomatic Passport of the Sovereign Military Order of Malta' in French, Italian and English on the cover. The usual request found in national passports is found inside the Order's passport in the following style: 'The Grand Chancellor of the Sovereign Military Hospitaller Order of St. John of Jerusalem of Rhodes and of Malta requests all those whom it may concern to allow the bearer . . . to pass freely and to afford him such assistance and protection of which he may stand in need'. As in the case of national passports, the passport of the Order of Malta contains a description of the bearer. Although all headings are in the three aforementioned languages, the description is always in French and in script.

At present, the Sovereign Order entertains formal diplomatic relations with thirty-two States,<sup>1</sup> which recognize *de jure* the Order's diplomatic passport. A number of

<sup>1</sup> Vatican City (since 1930); San Marino (since 1936); Spain (since 1937); Haiti (since 1947); Panama (since 1948); Argentina (since 1949); El Salvador (since 1951); Portugal (since 1951); Italy (since 1951); Brazil (since 1952); Paraguay (since 1952); Nicaragua (since 1953); Ecuador (since 1954); Peru (since 1954); Lebanon (since 1954); Chile (since 1956); Dominican Republic (since 1957); Colombia (since 1957); Austria (since 1957); Costa Rica (since 1958); Liberia

countries with whom the Order of Malta does not have formal diplomatic relations have also recognized the Order's passport *de facto*<sup>1</sup> without a visa, or by attaching their visa.<sup>2</sup>

The question might readily be asked whether a bearer of the Sovereign Order's Diplomatic Passport would be admitted into the United States in the absence of diplomatic relations between the Order of Malta and the United States. Under section 101 (a) (30) of the Immigration and Nationality Act of 1952,<sup>3</sup> 'the term "passport" means any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the entry of the bearer into a foreign country'. The Order of Malta does not exercise any territorial sovereignty anywhere. 'Competent authority' means a government of a foreign country. However, whether the document meets the requirements of section 101 (a) (30) turns on the question of whether it is valid for entry of the bearer into a foreign State. In view of the fact that thirty-two governments recognize the Order's passport for the purpose of admitting its bearer into the territory of the State, the document would qualify as a 'passport' for the purpose of admitting the bearer into the United States.

#### THE INDIVIDUAL AS A SUBJECT OF INTERNATIONAL LAW

Finally there remains for consideration the anomalous situation created by another non-State international subject or 'quasi-subject', man. There has been considerable controversy in the last few decades whether the individual enjoys the status of being a subject in the international legal domain.<sup>4</sup> If we assert that man is also a subject of international law, he may be able to equip himself with a travel document which would be recognized by States. The same recognition and acceptability given to the United Nations Laissez-Passer could be accorded to a travel document issued by an individual. One needs only to recall the case of Gary Davis,<sup>5</sup> the American who renounced his citizenship in Paris on 25 May 1948 and subsequently attempted to gain recognition as 'the first citizen of the world'. The self-styled universal citizen devised his own 'World Citizen Passport No. 000,001' which was the only travel document he carried when entering several European countries.<sup>6</sup>

(since 1959); Guatemala (since 1959); Honduras (since 1959); Cuba (since 1960); Cameroun (since 1961); Somaliland (since 1961); Iran (since 1961); Bolivia (since 1962); Gabon (since 1963); Uruguay (since 1965); Philippines (since 1965); Senegal (since 1965).

<sup>1</sup> Belgium, France, Federal Republic of Germany, Monaco and Switzerland.

<sup>2</sup> Pasini Costadoat (I), 'La personalidad internacional de la S.M.O. de Malta', *Revista Peruana de Derecho Internacional* (September–December 1948), pp. 229–48, at p. 234, n. 12.

<sup>3</sup> 66 Stat. 163, 8 U.S.C. 1101 et seq. (1952).

<sup>4</sup> The starting-point for examining the debate might well be G. Manner, 'The Object Theory of the Individual in International Law', *American Journal of International Law*, 46 (1952), pp. 428–49. See also M. St. Korowicz, 'The Problem of the International Personality of Individuals', *ibid.*, 50 (1956), pp. 533–62; G. Sperduti, 'L'individu en droit international', *Recueil des cours*, 90 (1956—II), pp. 729–849; C. A. Norgaard, *The Position of the Individual in International Law* (1962); R. S. Pollack, *The Individual's Rights and International Organization* (1966).

<sup>5</sup> See *Time* (10 January 1949), pp. 21–2.

<sup>6</sup> In fact, Davis was stateless after renouncing his United States citizenship. His home-made travel document was held to be invalid by a West German magistrate in Hanover on 30 July 1957 as he was convicted for violating West German border regulations by entering the country without a valid passport; *New York Times* (31 July 1957), p. 5. Davis subsequently returned to the United States from Italy in 1958 with an American visa attached to an Italian stateless person's document; *ibid.* (29 March 1958), p. 8. See also *ibid.* (12 April 1958), p. 2; (14 April 1958), p. 4; and (23 April 1958), p. 29. Between 1949 and 1957, Davis visited Belgium, the Netherlands and the United Kingdom without any national passport.



## CONCLUSIONS

Some non-State subjects of international law enjoy the function of issuing passports which are recognized by other subjects of the international community. In this category, there are the Holy See, the Order of Malta and the Free City of Danzig. We have on record the issuance of a travel document by international organizations which is acceptable to some Subjects of international law for the purpose of admitting the bearer to its territory. History does not reveal conclusively whether the individual's self-manufactured travel document has been recognized by some States. In the case of the international organization and the individual, however, the discriminating feature is that the document is not a passport. Nevertheless, if States recognize man as a subject of international law, the plenitude of the individual's capacity of rights and privileges might conceivably include a passport-issuing authority.

Those non-State entities which issue a passport follow the precedents established by the sovereign State.

# DECISIONS OF BRITISH COURTS DURING 1968 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

## A. PUBLIC INTERNATIONAL LAW\*

*Agency—relation of government and armed forces operating on foreign territory by virtue of a treaty with the sovereign power—status of national contingents of United Nations Force in Cyprus—liability of Crown for acts of such forces in either case—ambit of Royal prerogative—act of State*

*Case No. 1. Nissan v. Attorney-General*, [1968] 1 Q.B. 286; [1967] 2 All E.R. 200, John Stephenson J.; [1968] 1 Q.B. 286; [1967] 2 All E.R. 1238, Court of Appeal; [1969] 1 All E.R. 629; 2 W.L.R. 926, House of Lords.

Cyprus became an independent State on 16 August 1960. This event was preceded by a Treaty of Guarantee between the Republic of Cyprus, Greece, the United Kingdom and Turkey.<sup>1</sup> The plaintiff was a British subject and the tenant of a hotel in the part of Cyprus over which the United Kingdom had renounced sovereignty. On 25 December 1963 the government of Cyprus accepted an offer from the British, Greek and Turkish governments that their forces should assist the government of Cyprus in restoring peace. The relevant British forces were part of this joint force, stationed in Cyprus and placed under British command. This 'truce force' began to operate on 26 December 1963. On 29 December 1963 British troops of the 'truce force', in accordance with their orders, took possession of the plaintiff's hotel and remained until 27 March 1964 ('the first period'). The plaintiff alleged that on 29 December 1963 the British High Commissioner in the presence of the Secretary of State for Commonwealth Relations on behalf of the Crown undertook that the plaintiff should be compensated for loss caused by the occupation of his hotel.<sup>2</sup>

On 27 March 1964 a United Nations Force in Cyprus (U.N.F.I.C.Y.P.) was established by virtue of a Security Council resolution and with the consent of the government of Cyprus.<sup>3</sup> From 27 March 1964 until 5 May 1964 ('the second period') British troops formed part of U.N.F.I.C.Y.P. and in that capacity continued in occupation of the hotel.

The plaintiff sued the Crown in England in respect of the occupation of the hotel and consequent loss and damage. The statement of claim<sup>4</sup> disclosed three distinct claims and causes of action: (i) in justice and equity to compensation as of right; (ii) in contract for money due or damages; (iii) in tort for trespass to chattels.<sup>5</sup> Questions of law raised by the pleadings were referred for trial as a preliminary issue.

\* © Dr. Ian Brownlie, 1969.

<sup>1</sup> 19 February 1959, Misc. No. 4 (1959), Cmnd. 679; *United Kingdom Treaty Series* (1961), No. 5, Cmnd. 1253; *United Nations Treaty Series*, Vol. 382, p. 4.

<sup>2</sup> The present note does not deal with the claim in contract based upon this alleged undertaking: see [1968] 1 Q.B. at pp. 326, 341, 343, 351–2; [1969] 1 All E.R. at pp. 639, 640, 652, 659 and 663.

<sup>3</sup> See *United Kingdom Treaty Series* (1966), No. 32, Cmnd. 3017.

<sup>4</sup> Set out [1968] 1 Q.B. at p. 290.

<sup>5</sup> The third claim was the subject of a concession by counsel for the Attorney-General; at p. 297.

The plaintiff rested his first claim for prerogative compensation on *Burmah Oil Co. (Burmah Trading), Ltd. v. Lord Advocate*.<sup>1</sup> In his contention the taking and destruction of property were acts carried out lawfully by, or on the authority of, the Crown in the exercise of the royal prerogative. These acts were not battle damage, for which there was no right to compensation at common law, since there had been no fighting against an enemy of the Crown. Nor were they acts carried out during or in contemplation of the outbreak of a war in which the sovereign was engaged: thus the claim was not ruled out by the War Damage Act, 1965. John Stephenson J. assumed in the plaintiff's favour that the Sovereign may have the prerogative right 'to act anywhere in the modern world in the interests of Her subjects, one of which may be "the preservation of international peace and security" by contributing to the restoration and maintenance of peace, law and order in another State'.<sup>2</sup> In the learned judge's view the *Burmah Oil Company's* case did not limit the prerogative so as to exclude such action. The Court of Appeal took substantially the same view; Lord Denning M.R. observed:<sup>3</sup> 'In my opinion when Her Majesty sends her troops overseas to do duty in a foreign land, without the authority of Parliament, but with the accord of the foreign Sovereign, Her Majesty does it by virtue of the royal prerogative . . . and when her troops, in the exercise of their duty, take or destroy the property of one of Her Majesty's subjects in that foreign land, they do so again by virtue of the royal prerogative.' This issue was not a ground of decision in the House of Lords and the House took the view that it was sufficient in order to dispose of the preliminary issue to consider the relevance of the Act of state doctrine to the jurisdiction of the English courts.<sup>4</sup>

On behalf of the Crown, it was contended that the exercise of such a prerogative to the detriment of a British subject in an independent sovereign State does not give rise to a right of compensation: either because the cause of detriment was not a sovereign act for which Her Majesty was responsible or because the English courts had no jurisdiction over an act of State for which Her Majesty was responsible.

The first of these issues concerned the status of the British forces in occupation of the hotel in the first period. Acts of a foreign government, if such they were, could not be questioned in the English courts. John Stephenson J. concluded that the British forces were not acting as agents of the Cyprus government. He observed that they remained servants of the Crown and, further, that the extent of an implied or even express permission to take over the hotel could not create agency.<sup>5</sup> Lord Denning M.R.<sup>6</sup> and Winn L.J.<sup>7</sup> in the Court of Appeal expressly agreed with this conclusion and the reason for it; Danckwerts L.J. in effect had the same view.<sup>8</sup> The House of Lords reached the same conclusion and accepted the reasoning in the courts below.<sup>9</sup> However, Lord Reid expanded on the issue of agency:<sup>10</sup>

<sup>1</sup> [1965] A.C. 75.

<sup>2</sup> At p. 310.

<sup>3</sup> p. 340. See also Danckwerts L.J., p. 344. Winn L.J., p. 349, doubted whether the royal prerogative could operate in the territory of an independent sovereign, apart from war situations and instances of protectorates.

<sup>4</sup> See Lords Reid, Pearce, Wilberforce and Pearson, [1969] 1 All E.R. at pp. 639, 651-2, 658 and 663, respectively. Lord Reid doubted whether the prerogative recognized in the *Burmah Oil Company* case could operate in foreign territory; Lord Pearce, 'not without some doubt, did not agree'.

<sup>5</sup> pp. 311-12.

<sup>7</sup> pp. 345-6.

<sup>9</sup> [1969] 1 All E.R. at pp. 633 (Lord Reid), 640 (Lord Morris), 647 (Lord Pearce), 653 (Lord Wilberforce) and 659 (Lord Pearson).

<sup>10</sup> p. 633.

<sup>6</sup> p. 337.

<sup>8</sup> pp. 344-5.



The first question which arises is whether these facts show that the British forces were acting as agents of the Cyprus Government when they took possession of the respondent's hotel, so as to make their action the act of the Cyprus Government. I do not think that that is a necessary or even a reasonable inference from these facts. The Cyprus Government did not ask the British Government to send military aid. The British Government offered to send their forces and the Cyprus Government accepted that offer. The British forces were to act under British command, and there is no suggestion that the Cyprus Government had any control over them, or responsibility for them, or were under any obligation to pay for their services. They were to assist the Cyprus Government, so no doubt there would be consultation as to the best manner of rendering assistance. But the British Government had their own interest in preserving peace in the Middle East. It is common knowledge that there was grave apprehension of hostilities involving Greece and Turkey, and no one can say how far a war may spread. Moreover, the British Government were parties to the treaty of guarantee of 1960.

It must have been obvious to both governments when permission was given for British forces to operate in Cyprus territory that the British forces would require to use some buildings and other facilities in the area in which they operated. But nothing is said as to any arrangement about this with the Cyprus Government, and in particular nothing is said as to whether the Cyprus Government were even aware that the British forces intended to take the respondent's hotel, let alone as to whether they gave any authority for this. What the Crown has to establish is that, no matter what the other circumstances might be, the facts stated in the defence necessarily show that there was agency. And it was not argued that agency here means anything different from its ordinary meaning in English law. What was argued was that unless the British forces were acting as agents for the Cyprus Government it would not have been lawful under the law of Cyprus for them to take the hotel without the assent of the occupier. But we do not know what the law of Cyprus was. No doubt, if no evidence is led as to foreign law, there is a presumption that it does not differ from English law. But this case has not reached the stage of leading evidence. And even if it was unlawful under the law of Cyprus to take the hotel if the British forces were not agents of the Cyprus Government that does not prove that they were agents. All the circumstances so far as we know them, seem to me to point to the conclusion that in taking the respondent's hotel the British authorities acted on their own responsibility on behalf of the Crown.

The animadversions on agency have general interest since international law harbours similar issues (though terminology often obscures the kinship). However, the precise relevance of the decision is reduced by a number of factors. First, the point concerning agency was a narrow one, turning on the facts as pleaded: it did not follow that the forces could not be agents of the Cyprus Government in some contexts.<sup>1</sup> Secondly, agency depends closely on the particular facts of cases. Thirdly, agency, like possession, is susceptible to specialization on functional grounds: criteria usable in one legal context may be inappropriate elsewhere.<sup>2</sup> The outcome was to deprive the Attorney-General of the benefit of a not very meritorious plea. However, the result was by no means obvious. The Cyprus Government might have raised an issue of sovereign immunity and a test of overall official purpose rather than control is employed by some courts in that context.<sup>3</sup> It is noteworthy that Lord Reid, in the passage quoted earlier, refers to the British Government's own interest in preserving peace in the Middle East.<sup>4</sup>

<sup>1</sup> See Lord Wilberforce at p. 653.

<sup>2</sup> Cf. on possession, *United States and France v. Dollfus Mieg et Cie, S.A. and Bank of England*, [1952] A.C. 582.

<sup>3</sup> See the 'object and purpose' test applied in *Re Investigation of World Arrangements with Relation to Petroleum* (1952), 13 F. 280; *International Law Reports*, 19 (1952), No. 41.

<sup>4</sup> See also Lord Pearson at p. 659.

In relation to the second period of the occupation of the hotel it was contended for the Crown that the responsibility was that of the United Nations and the Crown relied upon the following sources of agency and authority: the Secretary-General's letter to the Foreign Minister of Cyprus,<sup>1</sup> the Secretary-General's letter to the United Kingdom Permanent Representative to the United Nations<sup>2</sup> and regulations 11 and 12 of the regulations for U.N.F.I.C.Y.P. issued by the Secretary-General.<sup>3</sup> The United Nations force was created by a recommendation of the Security Council with the consent of the Cyprus Government.<sup>4</sup> For the plaintiff it was contended that the British forces in the second period were still acting under the royal prerogative. They remained subject to the exclusive jurisdiction of Her Majesty's Government in respect of any criminal offences committed in Cyprus and to the disciplinary authority of their own national commander.

John Stephenson J. concluded that in the second period the British forces occupying the hotel did so as agents of the United Nations exclusively.<sup>5</sup> In his opinion there was no difference between the authority of the United Nations over their force and that of an independent sovereign State over its armed forces. If the British Government could establish forces in the territories of other States by agreement with their governments then so could the United Nations. The Court of Appeal came to this conclusion also. Lord Denning M.R.<sup>6</sup> dealt with the issue briefly:

On March 27, 1964, the British troops became part of the United Nations Force. They were under the command of the United Nations commander. They flew the United Nations flag. They wore the berets and arm-flashes to denote that they were no longer soldiers of the Queen, but the soldiers of the United Nations. They were acting as agents of the United Nations, which is a sovereign body corporate. Their actions thenceforward were not to be justified by virtue of the royal prerogative of the Crown of England. They were to be justified only by virtue of the United Nations.

The House of Lords reversed the finding of the Court of Appeal in respect of the second period of occupation.<sup>7</sup> Lord Morris gave the problem the most thorough consideration:<sup>8</sup>

The remaining question raised in the preliminary issue relates to the period after 27th March 1964. British troops continued in occupation of the hotel until 5th May 1964, when they handed it over to Finnish troops. I see no reason for imposing liability after that date. The position was, however, that between 27th March 1964 and 5th May 1964, the British troops were contingents of the United Nations Force. The preliminary issue which is raised is whether, on that basis and on the facts pleaded in para. 5 of the defence, there is a 'good defence in law' to the claims made. Paragraph 5 of the defence sets out that, early in March 1964, the Security Council recommended the creation of a United Nations peace-keeping force in Cyprus and that the Cyprus Government consented to this. There followed an agreement between the Secretary-General and the Government of Cyprus concerning the legal status of the United Nations Force. The

<sup>1</sup> 31 March 1964, para. 19; [1968] 1 Q.B., pp. 300-3; Cmnd. 3017, p. 7.

<sup>2</sup> 21 February 1966, paras. 3 and 9; printed in part, [1968] 1 Q.B., pp. 307-8; Cmnd. 3017, p. 1.

<sup>3</sup> See [1968] 1 Q.B., pp. 304-6; Cmnd. 3017, p. 20.

<sup>4</sup> See *ibid.*, pp. 299-304; Cmnd. 3017, p. 7; Bowett, *United Nations Forces*, pp. 552-60.

<sup>5</sup> [1968] 1 Q.B., pp. 313-16.

<sup>6</sup> *Ibid.*, p. 341. See also Danckwerts L.J., p. 345, and Winn L.J., p. 352.

<sup>7</sup> Lords Reid, Wilberforce and Pearson agreed that the cross-appeal should succeed in respect of the second period of occupation without giving their own reasons: [1969] 1 All E.R. at pp. 639, 659 and 664, respectively.

<sup>8</sup> *Ibid.*, pp. 646-7.



terms of that agreement are contained in a letter, dated 31st March 1964, from the Secretary-General to the Foreign Minister of Cyprus. It is said that the agreement became effective from 27th March and that it was later ratified by a law passed in Cyprus. If there was at that time any liability in the Crown towards the respondent (which is the question to be determined in the action) I cannot see how that liability is affected by the terms of an agreement between the Secretary-General and the Cyprus Government. If, of course, some arrangement was concluded and was carried out under which liability towards the respondent was assumed and was discharged then pro tanto, the respondent could not in a claim against the Crown assert any loss. These considerations would I think apply even if it were correct, as seems to be asserted, that the United Nations must be deemed to be a sovereign state that took over from the British Government when the British troops became part of the United Nations peace-keeping force. But that does not represent the true position. The United Nations is not a State or a Sovereign; it is an international organization formed (*inter alia*) to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to peace: it is based on the principle of the sovereign equality of all its members; it does not intervene in matters which are essentially within the domestic jurisdiction of a state.

If the letter from the Secretary-General to the Cyprus Foreign Minister is being considered, I do not find in its terms any provisions that would relieve the Crown from liability. Though that letter is the only document referred to in para. 5 of the defence (and therefore the only document that is directly relevant in this preliminary issue) attention was also given to the regulations for the United Nations force in Cyprus issued by the Secretary-General. They were dated 25th April 1964. Reference was also made to letters passing in February 1966 between the Secretary-General and the United Kingdom permanent representative to the United Nations. From the various documents published in Command 3017<sup>1</sup> it appears that, when the Security Council passed this resolution of 4th March 1964, they recommended that all costs pertaining to the United Nations force should be met in a manner to be agreed on by the governments providing contingents and by the government of Cyprus, though the Secretary-General was able to accept voluntary contributions in respect of costs. From the documents it appears further that though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British forces continued, therefore, to be soldiers of Her Majesty. Members of the United Nations force were subject to the exclusive jurisdiction of their respective national States in respect of any criminal offences committed by them in Cyprus. The Cyprus Government agreed that on a request from the commander of the United Nations force they (the government) would assist the force in obtaining equipment, provisions, supplies and other goods and services required from local sources for its subsistence and operation.

I would have expected that both in the period of the truce force and in the period of the United Nations force appropriate arrangements and agreements would have been made between the governments concerned in regard to questions concerning the expense involved in supplying the troops. But whether any arrangements were made or not I do not find warrant from a study of the terms of the letter of 31st March 1964 (which were accepted by the Cyprus Government), or from a study of the other documents in Command 3017, for holding on this preliminary issue that no claims made by the respondent in regard to the period between 27th March 1964 and 5th May 1964 could succeed.

<sup>1</sup> *United Kingdom Treaty Series* (1966), No. 32, 'Exchange of letters between the Government of the United Kingdom of Great Britain and Northern Ireland and the United Nations concerning Service with the United Nations Peace-Keeping Force in Cyprus of the National Contingent provided by the Government of the United Kingdom (including the Exchange of Letters between the United Nations and the Government of Cyprus and Regulations for the United Nations Force in Cyprus).'



Lord Pearce expressed himself as follows:<sup>1</sup>

My Lords, all the judgments in this case<sup>2</sup> are agreed that, on the facts pleaded, the British forces were not acting as agents for the Cyprus Government during the period before the arrival of the United Nations force. In this they were clearly right. There is nothing to prevent the Crown acting as agent or trustee if it chooses to do so, as Lord Atkin said in *Civilian War Claimants' Association, Ltd. v. Regem*.<sup>3</sup> But none of the matters pleaded raises any such inference. They all point to the British forces coming on the scene as allies and helpers, not as agents, and making their own arrangements for their accommodation. There is nothing to suggest that they called in aid the Cyprus Government or acted on their instructions or left it to them to arrange the occupation of the hotel.

All the judgments, however, took the view that during the second period the British troops no longer occupied the hotel in the Queen's name but in the name of the United Nations. I do not think so. The United Nations is not a super-State nor even a sovereign State. It is a unique legal person or corporation. It is based on the sovereignty of its respective members. But it is not a principal carrying out its policy through States acting as its agents. It is an instrument of collective policy which it enforces by using the sovereignty of its members. In carrying out the policies each member still retains its own sovereignty, just as any sovereign State, acting under its treaty obligations to another State, would normally still retain its sovereignty.

This view of the matter is strongly reinforced by the relevant letters and regulations. They show that the commander of the United Nations force is head in the chain of command and is answerable to the United Nations. The functions of the force as a whole are international. But its individual component forces have their own national duty and discipline and remain in their own national service. The Government of Cyprus (see letter 31st March 1964, para. 36)—‘will, upon the request of the Commander, assist the Force in obtaining equipment, provisions, supplies and other goods and services required from local sources for its subsistence and operation. . . . Members of the Force and United Nations Officials may purchase locally goods necessary for their own consumption . . .’ and so forth. Nowhere is there a suggestion that the United Nations are primarily liable for anything in respect of the payment or provisioning or accommodation of the forces. The financial liability of the United Nations Secretary-General is that (reg. 16)<sup>4</sup>:

‘. . . Within the limits of available voluntary contributions he shall make provision for the settlement of any claims arising with respect to the Force that are not settled by the Governments providing contingents or the Government of Cyprus. . . .’ This is the antithesis of assuming primary financial responsibility.

So far as the Government of Cyprus is concerned, it shall (by letter of 31st March 1964, para. 19)—‘provide without cost to the Force and in agreement with the Commander such areas for headquarters, camps, or other premises as may be necessary for the accommodation and the fulfilment of the functions of the Force . . .’.

There is no suggestion that the Government of Cyprus ever acted on this with regard to the troops with which we are here concerned. Nor is there any suggestion that the British Government ever asked it to do so, or altered the existing situation *vis-à-vis* the respondent or even requested the Cyprus Government to take over thereafter his claims. Even if the Cyprus Government had agreed with the British Government to take over the respondent's claims this would not have affected any claims of the respondent unless

<sup>1</sup> [1969] 1 All E.R., pp. 647-8.

<sup>2</sup> Above, pp. 220-1.

<sup>3</sup> [1932] A.C. 14 at p. 27; [1931] All E.R. Rep. 432 at p. 436.

<sup>4</sup> The Regulations for the United Nations Force in Cyprus were issued by the Secretary-General of the U.N. on 25 April 1964. They were effective from 10 May 1964, and were intended ‘for the most part . . . to continue in effect the policies and practices which have been followed in respect of the Force since it came into existence’. The regulations are set out in Cmnd. 3017.

and until the respondent accepted this transfer of responsibility as against the British Government. There is no suggestion that, during the second period, the United Nations or the Cyprus Government continued the billeting arrangements or that during the second period anybody did anything to show that thenceforward the British Government was acting as agent for either the United Nations or the Cyprus Government, in respect of billeting or that they had authority from either to do so.

Some of the formulations in their lordships' judgments are no doubt open to reservation as involving a *non sequitur* but the general principle applied, that the issue of financial responsibility is determined by the relevant agreements between governments contributing forces and the United Nations, is surely correct. 'The United Nations may assume responsibility for claims for loss suffered by private individuals in practice but there is no presumption that in law the Organization bears an exclusive or primary responsibility of this kind<sup>1</sup> and the law is still undeveloped. There are, of course, practical reasons militating in favour of the provision of ordinary domestic remedies. Moreover, there is a certain legal security involved in presuming that responsibility attaches to the State of origin of the forces since the legal regime of peacekeeping forces tends to be specialized, improvised and, in a strict sense, precarious: hence the possibility of gaps in the regime. Those, like Seyersted,<sup>2</sup> who would substantially assimilate the regime of organizations to that of States, fail to provide sufficiently specific guidance on the making of claims.

The issues which all three courts had to face were, assuming that the acts of occupation in the first and, or, second periods were the responsibility of the British Crown, whether these acts were acts of State and, if so, whether this afforded a defence to a claim by a British subject. It is hardly possible in the present compass to do full justice to this aspect of the case but some review must be attempted.

John Stephenson J.<sup>3</sup> adopted the definition of act of State propounded by Dr. E. C. S. Wade<sup>4</sup> thus: 'an act of the executive as a matter of policy performed in the course of its relations with another State including its relations with the subjects of that State, unless they are temporarily within the allegiance of the Crown.' The learned judge accepted the view that an act of State affected justiciability, in other words, the jurisdiction of the municipal courts was ousted. The occupation of the hotel in the first period was an act of State and during the second period it was an act of the United Nations equivalent to an act of State. Furthermore, even a British subject cannot make a claim against the Crown at least where the claim arises out of an act of State outside British territory.<sup>5</sup>

The Court of Appeal assumed that the issue of act of State was justiciable<sup>6</sup> and considered whether act of State was a defence to a claim by a British subject. They concluded that it was not. Lord Denning M.R.<sup>7</sup> stated firmly that act of State is no

<sup>1</sup> See Bowett, *United Nations Forces*, pp. 149-50, 242-4, 370-1, 445-8; Seyersted, this *Year Book*, 37 (1961), at pp. 420-3. Cf. Jenks, *The Proper Law of International Organisations*.

<sup>2</sup> See *Acta Scandinavica Juris Gentium*, 34 (1964), p. 46; *Indian Journal of International Law*, 4 (1964), pp. 1, 233; this *Year Book*, 37 (1961), p. 351 and, in particular, at pp. 430-3; and *United Nations Forces in the Law of Peace and War* (1966), pp. 108-9.

<sup>3</sup> pp. 316 et seq.

<sup>4</sup> This *Year Book*, 15 (1934), p. 98 at p. 103; cited in *Halsbury's Laws of England*, vol. 7 (3rd ed.), p. 279, para. 593.

<sup>5</sup> His lordship states the narrow proposition but later in the judgment he states a broad conclusion that British subjects cannot claim in respect of acts of State: pp. 323, 325, citing Dicey, *Conflict of Laws* (7th ed.), pp. 159 (Rule 21), 163.

<sup>6</sup> At least in the view of Winn L.J., [1968] 1 Q.B., at p. 348, for the purpose of deciding whether or not a particular act is an act of State.

<sup>7</sup> p. 339; and cf. pp. 340-1.

defence to a claim by a British subject. His lordship relied upon *Walker v. Baird*<sup>1</sup> and *Johnstone v. Pedlar*.<sup>2</sup> Danckwerts L.J.<sup>3</sup> referred to these cases and also to *Halsbury*<sup>4</sup> and the *Burmah Oil Company* case. Winn L.J.<sup>5</sup> referred *inter alia* to *Halsbury* and *Johnstone v. Pedlar*, but he went further and advanced the view that not all the acts consequent on the agreement to create the truce force between the United Kingdom, Greece, Turkey and Cyprus, which clearly was an act of State, were themselves acts of State. The act of occupying the hotel was not properly to be regarded as an act necessary for the implementing of the agreement with Cyprus. All three members of the Court expressed the view that the seizure of the hotel could not be distinguished from the claim for trespass to goods in so far as the availability of the defence of act of State was concerned.<sup>6</sup>

The House of Lords were agreed that the occupation of the hotel and related events during the first period, before the U.N.F.I.C.Y.P. was established, were not acts of State ousting jurisdiction. Lord Reid<sup>7</sup> discussed the difficulties of defining act of State and observed:<sup>8</sup> 'I think we must say either that all acts of the executive are acts of State, or that acts of the executive should only be called acts of State in cases where the court will not enquire into them or give relief in respect of them but should not be called acts of State when the court's jurisdiction is not ousted.' The relation between his lordship's premisses and his particular conclusions is not easy to determine but his principal conclusion<sup>9</sup> was 'that a British subject—at least if he is also a citizen of the United Kingdom and colonies—can never be deprived of his legal right to redress by any assertion by the Crown or decision of the court that the acts of which he complains were acts of State. It seems to me that no useful purpose is served by enquiring whether an act in respect of which a British subject claims redress is or is not an act of State, because a decision of that question can make no difference to the result.' Lord Morris<sup>10</sup> agreed with Winn L.J. that the act of taking possession of the hotel ought not to be regarded as an act necessary for the implementing of an act of State. He said that 'there is an air of unreality in talking about acts of State in relation to arrangements for the housing or provisioning of troops'. His lordship made a number of incisive comments on the different roles of the plea of act of State and remarked on the need to distinguish instances of non-justiciability, for example, in matters relating to the dealings of independent States, and instances of disability of a suitor arising from the fact that the source of harm was the result of a positive decision of the executive. Lord Morris was not convinced that the plea would not in all cases avail against British subjects.<sup>11</sup> Lord Pearce,<sup>12</sup> like Lord Reid, thought that it would be strange if act of State should be an effective plea in respect of things done outside the realm but not within it. In principle, he considered that act of State could not be effective against the claim of a British subject: but it was not necessary to decide the various large issues of law because there was nothing in the facts pleaded to suggest that the occupation of the hotel was necessary for the performance of the treaty and therefore it did not have the character of an act of State.<sup>13</sup>

Lord Wilberforce<sup>14</sup> engaged in a trenchant examination of act of State. In his opinion the doctrine includes two rules:

<sup>1</sup> [1892] A.C. 491.

<sup>3</sup> p. 344.

<sup>5</sup> p. 347.

<sup>6</sup> pp. 339, 344-5, 350. The point was not considered in any detail.

<sup>7</sup> pp. 633-8.

<sup>9</sup> p. 639.

<sup>11</sup> At p. 645.

<sup>13</sup> At p. 650.

<sup>2</sup> [1921] A.C. 262.

<sup>4</sup> Above, paras. 593, 594.

<sup>8</sup> p. 638.

<sup>10</sup> At p. 642.

<sup>12</sup> At p. 649.

<sup>14</sup> At pp. 653-6.



The first rule is one which provides a defendant, normally a servant of the Crown, with a defence to an act otherwise tortious or criminal, committed abroad, provided that the act was authorised or subsequently ratified by the Crown. It is established that this defence may be pleaded against an alien, if done abroad, but not against a friendly alien if the act was done in Her Majesty's dominions. . . .

The second rule is one of justiciability; it prevents British municipal courts from taking cognisance of certain acts. The class of acts so protected has not been accurately defined; one formulation is 'Those acts of the Crown which are done under the prerogative in the sphere of foreign affairs'<sup>1</sup> . . . As regards such acts it is certainly the law that the injured person, if an alien, cannot sue in a British court and can only have resort to diplomatic protest. How far this rule goes and how far it prevents resort to the courts by British subjects is not a matter on which clear authority exists. From the terms of the pleading it appears that it is this aspect of the rule on which the Crown seeks to rely.

Lord Wilberforce produced cogent evidence<sup>2</sup> for the view that the plea of act of State in the second form could be raised against a British subject, at least as regards acts committed abroad in the conduct, under the prerogative, of foreign relations with other States. His lordship concluded that the acts concerning the hotel alleged in the present case were outside the 'non-cognizance' principle since the link with the treaty was 'altogether too tenuous'. Lord Pearson<sup>3</sup> stated that 'an act of State is something not cognizable by the court: if a claim is made in respect of it, the court will have to ascertain the facts but if it then appears that the act complained of was an act of State the court must refuse to adjudicate on the claim'. His lordship<sup>4</sup> did not consider that the assumed facts showed that the occupation of the hotel was an act of State and reserved the question whether an act done outside the realm could ever be an act of State in relation to a British subject.

The decision in this case could not be definitive since the issues were raised as preliminary issues of law and the facts were not established. Moreover, there were a number of questions not raised in the pleadings and yet of considerable significance, for example, the relevance of local law and whether English law could apply to the events in Cyprus.<sup>5</sup> The judgments in the House of Lords nevertheless provide a helpful survey of the problems concerning the act of State doctrine and take the matter further than the earlier decisions. Unfortunately, the pervasive uncertainty of this part of English public law still remains. The non-justiciability of acts of State and the uncertain legal quality of acts under the prerogative may cause serious problems for aliens injured by acts of British authorities. If the act concerned is non-justiciable or conditionally lawful the question may be raised whether this results in an absence of State responsibility (no illegality under English law as the local law and no denial of justice) or a denial of justice entailing State responsibility since the court has refused to consider the merits. Perhaps in the case of act of State in the form of an assertion of non-justiciability the local remedies rule would be inapplicable, there being no remedies to exhaust. If Mr. Nissan were an alien and English law failed to provide a remedy for subjects or aliens against acts of State and/or under the royal prerogative, then *prima facie* the Crown would incur direct international responsibility.<sup>6</sup> If English law provided a remedy for British subjects only as a consequence of rules applying act of

<sup>1</sup> Referring to Wade and Phillips, *Constitutional Law* (7th ed.), p. 263.

<sup>2</sup> Including Lord McNair, *Law of Treaties* (1961), p. 361; and his *International Law Opinions*, vol. 2, p. 112.

<sup>3</sup> [1969] 1 All E.R. at pp. 659-60.

<sup>5</sup> See Lord Wilberforce at pp. 658-9.

<sup>6</sup> Though even on this basis defences might be available and some of these overlap to a greater or less extent with act of State as a defence to *liability*.

State in the sense of a doctrine of non-justiciability, the consequence would be a denial of justice. Thus acts causing harm to aliens, which under local or international law might be justifiable, would fail to be examined on the merits. Ironically, a discriminatory rule of non-justiciability would create a State responsibility which might not otherwise arise as a direct consequence of the original act complained of.

In conclusion, it is worth referring to the European Convention on Human Rights which, of course, applies to the United Kingdom and Cyprus but is not as yet a part of the domestic legal systems of the United Kingdom. Whether incorporation occurs or not, the doctrines of act of State and the prerogative have to face a compatibility test in relation to Articles 13 and 14 of the Convention.<sup>1</sup> Article 13 provides that 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. Article 14 states that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as . . . national or social origin . . . or other status'.

#### *Municipal law—relation to international convention*

*Case No. 2. The Annie Hay*, [1968] P. 341; 1 All E.R. 657, Brandon J. In this action the plaintiff claimed to limit his liability for damage to property caused by a collision between his motor vessel, the *Annie Hay*, and another motor vessel in Falmouth harbour. Certain of the defendants disputed this claim to limit liability. The plaintiff was at all material times the owner of the *Annie Hay* as well as being her master and navigator at the time of the collision. For the plaintiff it was contended that the right to limit liability arose under s. 3 (2) of the Merchant Shipping (Liability of Ship Owners and Others) Act, 1958, together with s. 503 (1) of the Merchant Shipping Act, 1894, as amended. In s. 3 (2) of the Act of 1958 it is provided:

In relation to a claim arising from the act or omission of any person in his capacity as master or member of the crew or (otherwise than in that capacity) in the course of his employment as a servant of the owners or of any such person as is mentioned in sub-s. (1) of this section—(a) the persons whose liability is excluded or limited as aforesaid shall include the master, member of the crew or servant, and, in the case where the master or member of the crew is the servant of a person whose liability would not be excluded or limited apart from this paragraph, the person whose servant he is; and (b) the liability of the master, member of the crew or servant himself shall be excluded or limited as aforesaid notwithstanding his actual fault or privity in that capacity. . . .

The question for decision was whether the plaintiff was entitled to limit liability when he was not only the master but also the owner. For the defendants it was argued that the expression 'master' in the sub-section should not be construed as including a master who is himself also an owner or a 'quasi-owner' (see the reference to managers, operators and others in s. 3 (1)). Brandon J. agreed with the construction put forward on behalf of the plaintiff as being in accordance with the ordinary and natural meaning of the words used in s. 3 (2). However, even if there was doubt as to the correct construction there were two other reasons for accepting the construction which would allow the plaintiff to limit his liability. One of these reasons was the fact that the bulk of the Act of 1958 was designed to give internal effect to the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships signed at

<sup>1</sup> See also the first Protocol (in force), Article 1.

Brussels on 10 October 1957.<sup>1</sup> From the terms of Article 6 (2) and (3) of the Convention it was clear that it was intended that a person in the situation of the plaintiff should be entitled to limit his liability. His lordship then referred to *Salomon v. Commissioners of Customs and Excise*<sup>2</sup> and *Post Office v. Estuary Radio Ltd.*,<sup>3</sup> both decisions of the Court of Appeal, as authority for the proposition that 'where domestic legislation is passed to give effect to an international convention, there is a presumption that Parliament intended to fulfil its international obligations'. The judgment also contains a mild stricture on the drafting of the legislation in point: 'I agree with counsel for the defendants that it would have made the task of the court easier if Parliament had chosen to enact the Convention in words more closely approximating to the words of the Convention itself; in particular, if art. 6 of the Convention had been transferred bodily into the Act of Parliament instead of being transferred, as I think it has been, by a more devious method.'

*Municipal law—relation to international convention*

*Case No. 3. The Mecca*, [1968] 2 Lloyd's Rep. 17, Brandon J. The court was concerned in this case with three matters arising out of a claim by the plaintiffs to limit their liability for damages in respect of a collision between their ship, the *Mecca*, and another. The question of the limit of their liability involved the interpretation of section 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1958. Brandon J. formulated the issue as follows:

Section 1 (1) of the Act prescribes two limits of liability, both related to gold. For loss of life or personal injury, the limit is the equivalent (by which is meant the sterling equivalent) of 3,100 gold francs per ton; for loss of or damage to property, or infringement of rights, the limit is the equivalent of 1,000 gold francs per ton. Section 1 (3) provides that the Board of Trade . . . may from time to time specify by order the amounts to be taken as the equivalents of those two sums in gold francs. Under that provision two orders had been made, one in 1958 and the other in 1967. The second order was made very soon after the recent devaluation of the pound and in consequence of it. It came into force on November 24 1967, and superseded the first order which had remained in force from August 1 1958, until then . . . should the limit of [the plaintiffs'] liability be ascertained by applying the equivalent of 1,000 gold francs specified in the 1958 Order, or that specified in the 1967 Order?

His lordship concluded that the equivalent in the 1967 Order should be applied, relying in particular on sub-section 4 of section 1 of the 1958 Act. However, the question of statutory interpretation was a difficult one and his lordship felt the need for further guidance in various quarters, one of which was as follows:<sup>4</sup>

The view which I have formed of the meaning of Section 1 seems to me to be supported also by the terms of the International Convention to which it is agreed that the 1958 Act was intended to give domestic effect. That is the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships. . . .<sup>5</sup> I am not satisfied that Section 1 of the 1958 Act is obscure or ambiguous, so as to make it necessary to seek assistance for its interpretation from the Convention. On the footing however, that there is such obscurity or ambiguity, the Court is entitled to seek such assistance. . . .<sup>6</sup>

<sup>1</sup> In force 31 May 1968; *United Kingdom Treaty Series* (1968), No. 52, Cmnd. 3678.

<sup>2</sup> [1967] 2 Q.B. 116; this *Year Book*, 42 (1967), p. 291.

<sup>3</sup> [1967] 1 W.L.R. 1396; this *Year Book*, 42 (1967), p. 295.

<sup>4</sup> p. 23.

<sup>5</sup> See above, n. 1 on this page.

<sup>6</sup> Citing *Salomon v. Commissioners of Customs and Excise*, [1967] 2 Q.B. 116; this *Year Book*, 42 (1967), p. 291, and *Post Office v. Estuary Radio Ltd.*, [1967] 1 W.L.R. 1396; this *Year Book*, 42 (1967), p. 295.



Under Article 3 (6) of the Convention the date on which conversion of gold francs into domestic currency is to be made is '... the date on which the shipowner shall have constituted the limitation fund, made the payment or given a guarantee under which the domestic law is equivalent to such payment'.

That provision is wholly inconsistent with the construction of Section 1 of the 1958 Act... which would require the conversion to be made as at the date when the damage occurred. Moreover, although it may be questioned whether subsection (4) gives complete effect to Article 3 (6) of the Convention, it seems to me that it represents a clear attempt, at least partially successful, to do so.

In both this decision and that of *The Annie Hay*<sup>1</sup> the relevant convention is in effect used as a form of extrinsic evidence without any rigid insistence that resort should be made to the convention only when the statute presents an impervious obscurity.

#### *Municipal law—relation to international convention*

*Case No. 4. Cheney v. Conn*, [1968] 1 W.L.R. 242; 1 All E.R. 779; (1967) 44 T.C. 217; (1967) 46 A.T.C. 192, Ungood-Thomas J. This case concerned a taxpayer of determination who objected to the way in which the State used his money and challenged the validity of an assessment under Schedule D for 1964-5 and an assessment to surtax for 1963-4. The taxpayer's submission was that the use of income-tax and surtax for the construction of nuclear weapons, with the intention of the Government to use them should certain circumstances arise, invalidated the assessments. His case was based principally on the assertion that there was a conflict between the tax legislation (the Finance Act, 1964, s. 12) and the Geneva Conventions Act, 1957. The latter instrument incorporated provisions of the Geneva Conventions of 1949 which would inevitably be contravened if nuclear weapons were used on a large scale in accordance with the policy of the deterrent strike as set forth in various White Papers.<sup>2</sup> It was conceded for the purposes of the case that a substantial part of the taxes for the relevant years was allocated to the construction of nuclear weapons.

Ungood-Thomas J. considered the relation of treaties and municipal law. In particular, he observed that if a statute is unambiguous, its provisions must be followed even if they are contrary to international law;<sup>3</sup> that normally treaties bind States only and not their subjects;<sup>4</sup> and that for treaties to be enforced by the English courts, there must be an enabling Act of Parliament.<sup>5</sup> He then referred to the terms of the title and preamble of the Geneva Conventions Act: 'An Act to enable effect to be given to certain international conventions done at Geneva on 12 August 1949, and for purposes connected therewith. Whereas, with a view to the ratification by Her Majesty of the conventions set out in the schedules to this Act, it is expedient to make certain amendments in the law.' The provisions of the Act relate to punishment of offenders against the conventions, legal proceedings against prisoners of war and internees, and prevention of abuse of Red Cross and other emblems. In its schedules the four Geneva

<sup>1</sup> Above, Case No. 2.

<sup>2</sup> See the *Statement on Defence 1963*, Cmnd. 1936; *Statement on Defence 1964*, Cmnd. 2270; *Statement on the Defence Estimates 1965*, Cmnd. 2592.

<sup>3</sup> Citing Viscount Simonds, in *Collico Dealings Ltd. v. Inland Revenue Commissioners*, [1962] A.C. at p. 19.

<sup>4</sup> Quoting from Oppenheim, *International Law*, vol. i (8th ed.), p. 924.

<sup>5</sup> Quoting from Oppenheim, *ibid.*, p. 40, and from Wade and Phillips, *Constitutional Law* (7th ed.), pp. 274, 275. The issue of whether the Geneva Conventions belong to the category of treaties affecting a subject-matter which lies within the prerogative power of the Crown, and therefore do not require legislation for their implementation in *all* respects was not canvassed: see McNair, *Law of Treaties* (1961), pp. 83-90.

Conventions of 1949 are set out. In this connection his lordship gave his reasons for dismissing the appeal:

What the Act of 1957 then does is to make certain specific amendments in the law by reference to particular provisions in the Geneva Conventions. There is no conflict whatsoever between the particular provisions included in those specific amendments and the Finance Act, 1964. . . .

What has been relied on has been the combination of the title and the preamble. . . . It is said that the whole object of the Act of 1957 was, first, with a view to ratification by the Crown; and, secondly, with a view to giving effect to the Geneva Conventions . . . the ratification would take effect, not by reason of this Act of Parliament at all, but by reason of ratification by the executive. . . . The title and preamble relied on do not make the Geneva Conventions statute and, therefore, except to the extent of the specific amendments to the law made by the Act of 1957 itself, which I have mentioned and which have not been relied on for the purposes of this case . . . the Act of 1957 does not provide material which can be relied on as being in conflict with the Finance Act 1964 at all. . . .

No doubt the outcome of the appeal was inevitable: even if the four Geneva Conventions had been treated as a part of English law, it would have been extremely difficult to establish that on a reasonable construction they provided a right to withhold tax. However, the court would seem to have taken an unusually narrow view of the process of legislating to give effect to a treaty. It is, of course, quite normal for conventions to be scheduled to an Act which does not itself reiterate all the provisions. It is a matter of interpretation but the incorporation into English law is not necessarily limited to the provisions of the Act apart from the schedule(s).<sup>1</sup> Moreover, it was something of a *petitio principii* to say that the terms of the Finance Act were, in themselves, unambiguous. If the relevance of the Geneva Conventions scheduled to the Act of 1957 were admitted then there is a latent ambiguity arising from an apparent conflict of statutory provisions.<sup>2</sup> Further, it is no longer judicial practice to ignore conventions on the ground that the terms of a statutory provision are clear in themselves.<sup>3</sup> Moreover, if the relevant convention is consulted, the statutory provision is seen to be ambiguous. In two recent Privy Council decisions<sup>4</sup> the relevant Geneva Convention scheduled to the Geneva Conventions Act, 1962, of the Federation of Malaya<sup>5</sup> was applied in determining the question whether there had been a mistrial. This inquiry was not confined to those provisions which appeared in the text of the Act apart from its schedules. Of course, it is unlikely that the Geneva Conventions contemplate the withholding of tax as a sanction to uphold their provisions and so the Finance Act would prevail in any event; treaties are unlikely to be allowed to affect such areas of government action as the machinery of tax assessment and collection by a side wind. The taxpayer in this case would prefer to argue that he was not claiming rights as an individual taxpayer

<sup>1</sup> See Sinclair, *International and Comparative Law Quarterly*, 12 (1963), at pp. 528-9; and *British Practice in International Law* (1964), p. 232.

<sup>2</sup> Cf. the relation of the Customs and Excise Act, 1952, schedule 6 of that Act and the Convention of the Valuation of Goods for Customs Purposes, 1950, in *Salomon v. Commissioners of Customs and Excise*, [1967] 2 Q.B. 116, this *Year Book*, 42 (1967), p. 291. Also on the interrelation of statutes see *R. v. Kent Justices, Ex parte Lye*, [1967] 2 Q.B. 153, this *Year Book*, 42 (1967), p. 293; *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government*, [1960] A.C. 260; and *Cox v. Army Council*, [1962] 2 W.L.R. 950, this *Year Book*, 38 (1962), p. 472. Cf. *Post Office v. Estuary Radio Ltd.*, [1967] 1 W.L.R. 1396, this *Year Book*, 42 (1967), p. 295.

<sup>3</sup> See *Salomon v. Commissioners of Customs and Excise* (last note).

<sup>4</sup> *Cases No. 7 and 8*, below, pp. 234, 238.

<sup>5</sup> No. 5 of 1962. This is in all material respects identical with the United Kingdom Act of 1957.

under the Conventions but rather that the Government through the conventions and the Act of 1957 had limited its own powers. In other words he was pleading the *ultra vires* of the Crown in terms of parliamentary legislation and not challenging the supremacy of Parliament which it was his lordship's declared concern to uphold.<sup>1</sup> By way of analogy it can be pointed out that to invoke the Diplomatic Privileges Act, 1964, on the issue of jurisdiction is not to claim a personal right under the Vienna Convention on Diplomatic Relations.

*Municipal law—relation to international convention—relation of English statutory text to official French text of convention*

*Case No. 5. Corocraft Ltd. and Another v. Pan American Airways, Inc.*, [1969] 1 Q.B. 616, Donaldson J., and C.A. The plaintiffs were the owners and/or consignees of a carton containing jewellery valued at £1,194. The carton was tendered to the defendants for carriage by air from New York to London. The columns of the air consignment note were completed including the gross weight column, but the space for 'Dimensions or volume' was left blank. The carton was stolen by an employee of the defendants after reaching London. The two plaintiffs issued a writ claiming damages for breach of contract and/or duty in or about the carriage of goods by air. The defendants pleaded that they were entitled to limit their liability under the Schedule to the Carriage by Air Act, 1932. It was agreed that the following issue should be tried, namely: 'Whether the right (if any) of the defendants to exclude or limit their liability as alleged in the Amended Points of Defence and Rejoinder is excluded by the alleged omission from the air waybill of particulars of (a) the volume (b) the dimensions of the goods.' It was conceded that the carriage was subject to the Warsaw Convention as scheduled in the Carriage by Air Act, 1932, and the carton was lost during the carriage by air.

As scheduled in the Act of 1932, the Warsaw Convention provides in part as follows:

Art. 8: The air consignment note shall contain the following particulars:— . . . (i) the weight, the quantity and the volume or dimensions of the goods.

Art. 9: . . . if the air consignment note does not contain all the particulars set out in article 8 (a) to (i) inclusive and (9), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.

Art. 22 (2): In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consigner has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. . . .

It was accepted by the parties that the Act of 1932 gave effect to the Warsaw Convention. In the official French text of the Convention Article 8 (i) omitted the word for 'and' and included a comma after the word for quantity. Counsel for the plaintiffs relied on the version set out in the English statute and contended that on a correct construction this prevented the limitation of liability by reason of the omission from the air consignment note of particulars of the volume or dimensions of the goods. It was pointed out that the Carriage by Air Act, 1932, section 1 (1), provides that the provisions of the Warsaw Convention 'as set out in the First Schedule', to the Act to 'have the force of law in the United Kingdom'. In contrast the Carriage by Air Act of 1961, section (2), provides in terms that the French text of the amended Warsaw Convention shall be authoritative in the event of inconsistency. For the defendants it was argued *inter alia* that the Act of 1932 gave effect to the Convention and, having regard

<sup>1</sup> [1968] 1 All E.R. at p. 782.



to the French text, the word 'and' in Article 8 (i) of the schedule to the Act must be rejected. If the word 'and' was not rejected then the sanction provided in Article 9, described by Donaldson J. as 'severe', would operate.

Donaldson J. considered and rejected certain submissions on behalf of the defendants before reaching the issues concerning the construction of the Act of 1932 in the light of the French text of the Warsaw Convention. His lordship had heard the evidence of two experts in French law on the meaning of the French text and the schedule to the Act which was inadmissible on those matters (and, in any case, they were not agreed). Investigation of the views of American courts proved inconclusive, but some guidance was obtained from the attitude of other systems of law toward Article 8. Reference was made also to commercial practice, McNair's *Law of the Air* (3rd edition), and Drion's *Limitation of Liabilities in International Air Law*. His lordship concluded that Parliament had adopted the conjunctive approach and therefore the air consignment note did not comply with Article 8 (i) in that it omitted particulars of the volume or dimensions of the goods. In reaching this conclusion the Court accepted that the Convention could be looked at in seeking the intention of Parliament but of course the official French text, being regarded as ambiguous, was unhelpful.

The defendants appealed successfully. In his judgment Lord Denning M.R. described Article 9 as a 'remarkable provision' and stated that it had continuing significance more especially since many countries had not ratified the amending convention. On the problem of construing Article 8 his lordship concluded that the French text should prevail. His principal reasons for this conclusion appear from the passages which follow:

The Warsaw Convention is only law in England in so far as Parliament has made it so. But Parliament has made it part of our law. It passed the Carriage by Air Act, 1932, for the express purpose of *giving effect* to the Convention. But then in the very first section the Acts says that: '... the provisions thereof (that is, of the Convention) *as set out in the First Schedule to this Act shall* ... have the force of law in the United Kingdom ...'.

Then, if you turn to Schedule 1, you find the English text of the Convention: but it includes in Article 36 the words: '*The Convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland. . . .*'

It was plainly the intention of all the parties to the Convention that the French text should be the one official and authorised text; and it was plainly the intention of the English Parliament to give effect to that French text by making an exact translation of it into English. The English Parliament failed in their object. The translator whom they employed, by introducing the word 'and', put his own gloss on the French text. He produced certainty where there was ambiguity: and clarity where there was obscurity. But this was a translator's gloss which he should not have inserted. In order to produce an exact translation, the translator should reproduce the French text faithfully, with all its defects, deficiencies, ambiguities and uncertainties.

Such being the clear intention of Parliament, I think we should follow it. If there is any inconsistency between the English text and the French text, the text in French should prevail. I know that the Act of 1932 says that we are to give effect to the provisions of the Convention '*as set out in the First Schedule*'. That description of the Convention is true enough so long as the translation is an exact translation. But as soon as any inconsistencies appear, the description is no longer a true description of the Convention but is a false description of it: and it should be rejected in accordance with the maxim '*Falsa demonstratio non nocet*': see *Eastwood v. Ashton*,<sup>1</sup> *per* Lord Parker of Waddington.<sup>2</sup>

<sup>1</sup> [1915] A.C. 900, H.L. (E).

<sup>2</sup> *Ibid.*, 912, 913.

There is another, and perhaps more powerful, reason for adopting the French text. The Warsaw Convention is an international convention which is binding in international law on all the countries who have ratified it: and it is the duty of these courts to construe our legislation so as to be in conformity with international law and not in conflict with it. Seeing that the Convention itself gives authority to the French text, and to the French text alone, we should so construe our legislation as to give priority to the French text over the English version. That appears from *Salomon v. Commissioners of Customs and Excise*.<sup>1</sup> The case of *Ellerman Lines Ltd. v. Murray*<sup>2</sup> is no authority to the contrary, for there the English statute was clearly given priority over the Convention. Not so here.

On the interpretation of Article 8 (i) his lordship took the view that the French text was ambiguous and concluded: 'as a matter of commercial practice, the weight is usually the thing that matters. Seeing that the French text is ambiguous and uncertain, I should have thought that it should be interpreted so as to make good sense amongst commercial men . . . the sender . . . need not give the volume or dimensions except when it is necessary or useful so to do.' In support of this view he referred to the regulations of the International Air Traffic Tariffs Corporation. His lordship, on the assumption that it was wrong to give priority to the French text, then considered the English text, and rejected a literal interpretation. A factor which, in his opinion, operated in favour of the liberal construction was that this was in accord with the United States approach to Article 8<sup>3</sup> and the result should be the same whether the sender brought his action in New York or in London. Widgery L.J. agreed with the judgment of Lord Denning M.R. but made the following useful remarks:

Much of the argument before us was directed to the question of which of the two versions of the Convention (namely the original French, and the English translation in Schedule 1 to the Carriage by Air Act, 1932) governed this case. In the end this question has not proved decisive in the appeal, but I am satisfied that the French version is to be preferred.

Mr. Mustill has referred us to *Ellerman Lines v. Murray*<sup>4</sup> and particularly to the dictum of Lord Tomlin when he said:<sup>5</sup> 'Nor do I think that, assuming there is any divergence between the draft convention and the Act, it would be proper to resort to the draft convention for the purpose of giving to the section a meaning other than that which in my judgment is its natural meaning.' In my judgment, however, the present case is clearly distinguishable, for the reason given by Lord Blanesburgh in the *Ellerman* case,<sup>6</sup> namely, that in that case 'the method adopted . . . [to incorporate the Convention] is not, as it might have been, to transfer the international language of the Convention to the body of the Act, *simpliciter*, but it is to translate that language into the phraseology of the Merchant Shipping Acts and to give statutory effect to the Convention in that form of words, for better or for worse'.

In the present case it is clear that the intention of Parliament was to accept the *ipsissima verba* of the Convention and a mistranslation of the French version is not the same thing. Nor am I impressed by the fact that in the Carriage by Air Act, 1961, the comparable question is expressly dealt with in section 1 (2), for this means no more than that the draftsman was aware of the question which arose on the Act of 1932 and was determined that it should not arise again.

The present case concerns a well-confined area: the statute was intended to integrate the convention *tout court* and its schedule was a translation of the only official

<sup>1</sup> [1967] 2 Q.B. 116; [1966] 3 W.L.R. 36; [1966] 2 All E.R. 340, C.A.

<sup>2</sup> [1931] A.C. 126, H.L. (E).

<sup>3</sup> Reference was made to *American Smelting & Refining Co. v. Philippine Air Lines Inc.*, [1954] U.S. & Ca. Av. Rep. 221; [1955] U.S. & Ca. Av. Rep. 385; [1956] U.S. & Ca. Av. Rep. 387.

<sup>4</sup> [1931] A.C. 126.

<sup>5</sup> *Ibid.*, 147.

<sup>6</sup> *Ibid.*, 133.

text.<sup>1</sup> However, the somewhat blinkered approach adopted by Lord Tomlin in *Ellerman Lines* in any event has been eschewed in *Salomon v. Commissioners of Customs and Excise* and *Post Office v. Estuary Radio, Ltd.* No doubt the courts should be cautious in relating the criteria which decide reference to the relevant convention and the method chosen by Parliament for giving effect to the convention, since the latter may be of little or no relevance.

*Criminal jurisdiction—conspiracy to commit crime abroad*

*Case No. 6. R. v. Cox (Peter Stanley)*, [1968] 1 W.L.R. 88; 1 All E.R. 410, C.A. This was an application for leave to appeal out of time against conviction on a count which charged conspiracy to defraud such persons as should be induced to part with goods to the defendants by falsely representing that they or one of them had an account at a bank in Essex. In pursuance of the conspiracy, unused cheques were used by the applicant in France to obtain jewellery fraudulently from shopkeepers. Even after an amendment the result of which was a charge of conspiracy to sell the goods so obtained in Essex,<sup>2</sup> the indictment contained nothing which pointed to the commission of an act in England which was criminal under English law. The application was granted and the conviction at Assizes was quashed 'with very bitter regret' by a rueful Court of Appeal. Winn L.J., giving the judgment of the Court, observed: 'It is the law of this country as it now stands (fortunately it is receiving attention from one of the law reform committees) that there cannot be an indictment laid in this country for the commission of criminal offences abroad with the exception of murder and, I think, probably treason.' He also referred to the possibility of indictment where the conspiracy, though involving crimes abroad, would cause a public mischief in this country or injure a person here by causing him damage abroad.<sup>3</sup> This view did not apply to the facts of the present case. The decision in *R. v. Kohn*<sup>4</sup> was distinguished:

The conspiracy there was to cast away and destroy a certain Prussian merchant ship to the prejudice of underwriters. In fact the ship was sunk far out of English territorial waters; but Willes J. directed the jury that conspiracy in this country to commit an offence was criminal and unless the conspiracy was limited to an offence to be committed abroad the indictment would lie in this country, for it might have been within the contemplation of the conspirators that the ship might be scuttled or otherwise destroyed off the bar close in territorial waters; that is quite clearly a case where the possibility existed, albeit it may not have been expressly the intention of the conspirators, to carry out in pursuance of their conspiracy, and as an overt act of the conspiracy, a crime within the United Kingdom.

Professor Glanville Williams<sup>5</sup> has given a wider interpretation of *R. v. Kohn*; in his view: 'As another exception from the rule in *Board of Trade v. Owen*, it seems from an earlier decision that a conspiracy entered into here will be punishable if the conspirators contemplate that the illegality may be performed *either*<sup>6</sup> within British jurisdiction

<sup>1</sup> Generally, on the interpretation of plurilingual treaties by international courts and tribunals, see Dr. Jean Hardy, this *Year Book*, 37 (1961), p. 72. This writer deals with problems analogous to those in the English court at pp. 106-7 and 146-7.

<sup>2</sup> But see the comment by Professor J. C. Smith, [1968] *Crim. L.R.* at p. 164.

<sup>3</sup> *Board of Trade v. Owen*, [1957] A.C. 602 at p. 634 *per* Lord Tucker (with whom the other Law Lords agreed).

<sup>4</sup> (1864), 4 F. & F. 68. See also Lord Goddard L.J., in *Board of Trade v. Owen*, [1957] 1 Q.B. 174 at pp. 192-4.

<sup>5</sup> *Law Quarterly Review*, 81 (1965) at p. 536. See also Smith and Hogan, *Criminal Law* (2nd ed.), p. 158 and *Board of Trade v. Owen*, [1957] A.C. at pp. 629-31.

<sup>6</sup> Italics inserted.



or<sup>1</sup> abroad—even though in the event, the illegality is performed abroad.’ Apart from authority, it is curious that criminal conspiracy extends to a wide variety of acts, including a public mischief and perhaps conspiracy to trespass<sup>2</sup> and yet a conspiracy here to commit a crime abroad (a crime under English law and, presumably, the law of the place of commission) is not indictable. However, the doctrine of *Board of Trade v. Owen* may be susceptible to a degree of subversion. The proviso concerning the production of a public mischief in this country or injury to a person here in effect leaves the matter very much at large. Moreover, the *ratio decidendi* is confined to the situation where ‘unlawful means’ were used to achieve a ‘lawful object’ and, in the view of the House of Lords on the particular facts, the ‘unlawful means’ and the ‘ultimate’ object were both outside the jurisdiction.<sup>3</sup>

*Law of war—Geneva Convention Relative to the Treatment of Prisoners of War, Articles 4 and 5—burden of proof on issue of protected status—status of nationals of a person owing ‘allegiance’ to the detaining power*

*Case No. 7. Public Prosecutor v. Oie Hee Koi* (and associated appeals), [1968] A.C. 829, P.C. It is now a commonplace to observe that in present political conditions internal conflict, often with some degree of foreign intervention on behalf of either the government or the insurgents or both, is a recurrent phenomenon. Some recent appeals to the Privy Council from Malaysia thus raise important issues concerning the status of participants in certain types of internal political and military conflict. The facts appear from the opinion of Lord Hodson as follows:<sup>4</sup>

The accused are so-called Chinese Malays either born or settled in Malaysia but in no case was it shown whether or not they were of Malaysian nationality. Most carried blue identity cards issued pursuant to the National Registration Regulations which by reg. 5 (2) (a) provide for the issue of ‘blue bordered cards with blue printing to citizens of the Federation of Malaya’. One carried a red card appropriate to a non-citizen.

They were captured during the Indonesian confrontation campaign. All but two were dropped in Malaysia by parachute as members of an armed force of paratroopers under the command of Indonesian Air Force Officers. The main party were dropped in Johore wearing camouflage uniform. Each man carried a fire-arm, ammunition, two-hand grenades, food rations and other military equipment. Of the main party thirty-four out of forty-eight were Indonesian soldiers and fourteen Chinese Malays which included twelve of the accused. One was dropped from a different plane similarly equipped. The remaining two accused landed later by sea and were captured and tried.

All of the accused were convicted of offences under the Internal Security Act, 1960, of the Federation of Malaya and sentenced to death. Appeals against conviction were dismissed by the Federal Court of Malaysia<sup>5</sup> except in two cases (one of these being that of Koi).<sup>6</sup> In these two cases the appeals were allowed on the ground that the accused were prisoners of war within the meaning of the Geneva Conventions Act, 1962, of the Federation of Malaya, which gave effect to the Geneva Convention relative to the treatment of prisoners of war of 1949. In these two cases the public prosecutor appealed and in the remaining cases the accused appealed, in all cases by special leave.

<sup>1</sup> Italics inserted.

<sup>2</sup> Glanville Williams, *Criminal Law, The General Part* (2nd ed.), pp. 698–9, citing *Bramley* (1946), 11 J. Cr. L. 36, Central Criminal Court, Stable J.

<sup>3</sup> See Lord Tucker, [1957] A.C. at p. 634; and cf. Archbold, *Criminal Pleading, Evidence and Practice* (37th ed.), para. 4059.

<sup>4</sup> [1968] A.C. at p. 850.

<sup>5</sup> [1966] 1 M.L.J. 100, 210, 215, 219, 252; [1966] 2 M.L.J. 167.

<sup>6</sup> [1966] 2 M.L.J. 183.

The material provisions of the Act of 1962 were as follows:

2. In this Act, unless the context otherwise requires— . . . 'protected prisoner of war' means a person protected by the convention set out in Sch. 3;

'the protecting power', in relation to a protected prisoner of war or a protected internee, means the power or organisation which is carrying out, in the interests of the power of which he is a national, or of whose forces he is, or was at any material time, a member, the duties assigned to protecting powers under the convention set out in Sch. 3 or, as the case may be, Sch. 4; . . .

4 (1) The Court before which—(a) a protected prisoner of war is brought up for trial for any offence; or (b) . . . shall not proceed with the trial until it is proved to the satisfaction of the Court that a notice containing the particulars mentioned in Sub-s. (2), so far as they are known to the prosecutor, has been served not less than three weeks previously on the protecting power and, if the accused is a protected prisoner of war, on the accused and the prisoner's representative.

Section 4 (2) sets out the particulars required.

The Privy Council first approached the question whether or not the category of protected prisoner of war includes nationals of, or persons owing allegiance to, the captor State. It was remarked that Article 4 of the Prisoners Convention on its face is capable of including the nationals of the detaining power who are captured by that power; that there was an armed conflict between Malaysia and Indonesia bringing the Convention into operation; that the Convention applies even in the absence of a state of war recognized by one of the parties; and that both Malaysia and Indonesia are parties to the Convention. The Board concluded unanimously that the Convention did not apply to nationals of the detaining power. The reasons for this conclusion, none of which appears to have been conclusive in itself, were as follows:<sup>1</sup>

(i) The position in customary law was represented by the following passage in Oppenheim:<sup>2</sup> 'The privileges of members of armed forces cannot be claimed by members of the armed forces of a belligerent who go over to the forces of the enemy and are afterwards captured by the former. They may be, and always are, treated as criminals. The same applies to traitorous subjects of a belligerent who, without having been members of his armed forces, fight in the armed forces of the enemy. Even if they appear under the protection of a flag of truce, deserters and traitors may be seized and punished.'

(ii) A study of the Convention leads to a strong inference that it is an agreement between States primarily for the protection of the members of the national forces of each against the other.

(iii) Articles 87 and 100 'point convincingly in this direction', since they refer expressly to the circumstances that the accused is not a national of the detaining power.

(iv) Reference by counsel for certain accused to Articles 82 and 85 of the Convention (which are in general terms) and the decision of an American court in *In re Territo*<sup>3</sup> disclosed no persuasive matter the other way.

Their Lordships' conclusion is undoubtedly correct<sup>4</sup> but it is important to emphasize its context, which is the case in which the detainee is 'a member of the armed forces of [an enemy State] or of a volunteer corps forming part of such armed forces'.<sup>5</sup> Where

<sup>1</sup> At pp. 856-8.

<sup>2</sup> *International Law* (7th ed.), vol. 2, p. 268.

<sup>3</sup> (1946), 156 Fed. Rep. (2nd), 142.

<sup>4</sup> See Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd rev. ed., 1945), vol. 3; Greenspan, *The Modern Law of Land Warfare*, p. 99; Green, *University of Malaya Law Review*, 3 (1961), p. 25 at pp. 38-42.

<sup>5</sup> Opinion of the Board at p. 854.

nationals satisfy the conditions of lawful belligerency in the context of a civil war the Convention as a whole does not apply and instead the minimum provisions of Article 3 operate. Clearly this Article would have little value if it does not apply to nationals of a detaining power (the lawful government at the outset of civil strife). However, there is not inconsiderable evidence for the view that the existing practice, perhaps a custom *in statu nascendi*, is to apply the law of war in civil war situations. The evidence relates to French operations in Indo-China, as it then was,<sup>1</sup> to the war in Algeria<sup>2</sup> and to the practice of the U.S. Military Assistance Command in South Vietnam.<sup>3</sup> Of course, it may be that so far the practice goes no further than the substance of Article 3 of the Convention.<sup>4</sup> If the customary law has evolved in this way, however, then a difficult distinction of fact becomes essential to make. Thus it is common for varying degrees of foreign intervention to occur and it will be necessary to distinguish between the case of indigenous rebel units receiving foreign assistance and the case in which local dissidents form part of the armed forces of a foreign State in a state of armed conflict with the territorial sovereign which is the detaining Power. It is worth noting that, in relation to the Civilians' Convention, it has been pointed out that nationality is no longer an appropriate connecting factor (as a criterion for expulsion at the outbreak of war) in view of the ideological factors prominent in world affairs.<sup>5</sup>

The Board turned from the nationality issue to the analogous question of allegiance:<sup>6</sup>

Having reached the conclusion that the Convention does not extend . . . to nationals of the detaining power, their lordships are of opinion that the same principle must apply as regards persons who, though not nationals of, owe a duty of allegiance to, the detaining power. It may indeed be said that allegiance is the governing principle whether based on citizenship or not. Whether the duty of allegiance exists or not is a question of fact in which a number of elements may be involved. In this connection it is convenient to refer to the case of *Joyce v. Director of Public Prosecutions*<sup>7</sup> . . .

The continuance of allegiance may be shown in a variety of ways . . . it is useful to refer to a decision of the Special Criminal Court Transvaal . . . namely *R. v. Neumann Transport*.<sup>8</sup> It was there held that an alien who had taken the oath of allegiance to His Majesty King George VI, even after his departure from the Union, might still have enjoyed its protection and owed a consequent debt of allegiance, and that the circumstances of his residence within the Union and notwithstanding his departure were matters to be determined by evidence in order to decide whether the accused owed allegiance to the State and whether his departure terminated it.

With respect their lordships seem to have been content with the merest gossamer to support a proposition of considerable novelty. A good case could no doubt be made for extending the concept of national in the Geneva Convention to include persons who have a substantial and genuine link with a State.<sup>9</sup> However, there is probably a presump-

<sup>1</sup> The application of rules relating to prisoners of war is reported by commentators: see Pinto, *Recueil des cours*, 114 (1965-I), at p. 535; and Hooker and Savasten, *Virginia Journal of International Law*, 5 (1965), p. 243 at p. 260.

<sup>2</sup> Pinto, *Recueil des cours*, 114 (1965-I), at p. 535; and Touscoz, *Annuaire français de droit international*, 9 (1963), p. 953 at pp. 959-61.

<sup>3</sup> Directives issued by Headquarters, 1967 and 1968, printed in *American Journal of International Law*, 62 (1968), p. 765.

<sup>4</sup> Generally on Article 3 see Draper, *Recueil des cours*, 114 (1965-I), pp. 82-118.

<sup>5</sup> Seeger, *Le Statut personnel des étrangers ennemis et la Convention de Genève du 12 août 1949 relative à la protection des civils* (1958), pp. 60-1, 113, 159.

<sup>6</sup> pp. 858-9.

<sup>7</sup> [1946] A.C. 347.

<sup>8</sup> [1946] S.A.L.R. (T.P.D.) 1238.

<sup>9</sup> See the *Nottebohm* case (Second Phase), I.C.J. Reports, 1955, p. 4 and the commentary by the present writer, this *Year Book*, 39 (1963), p. 284 at pp. 349-64. See also the *Schmeichler-Pagh* case, *Journal du droit international*, vol. 92 (1965), p. 689, Danish Supreme Court.



tion that, unless the contrary is expressly provided, reference to 'national(s)' in a treaty is to nationality within the meaning of a system of municipal law. Moreover, if a concept of substantial connection is to be employed, it should not take the uncertain guise of allegiance, particularly if this doctrine is applied on the basis of a possibility of claiming protection after quitting a country. It is of some interest to recall the terms of Articles 87 and 100 of the Prisoners' Convention, relied upon by their lordships for their other proposition: thus the latter article states 'that since the accused is not a national of the detaining power, he is not bound to it by any duty of allegiance'.

The principal issue for the purpose of the appeals was whether a mistrial had occurred by reason of a failure to give the notices required by Article 4 of the Convention. Article 5 provides: 'The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.'

The Board took the view that, except in the case of the appellant Chai, there had been no mistrial. In the cases of Oie Hee Koi and Ooi Wan Yui, the appeals of the Public Prosecutor were allowed on the basis that they were not entitled to protected status. The point having been taken on appeal from the trial judge, the Federal Court had held that the accused were entitled to protection. In the other cases, apart from the case of Teo Boon Chai, in the opinion of the Board:<sup>1</sup> 'no point had been raised at the trial, and therefore no "doubt arose" so as to bring s. 4 into operation. Their lordships are of opinion that on the hearing of their appeals by the Federal Court no burden lay on the prosecution to prove that those of the accused who had raised no doubt at their trials as to the correctness of the procedure followed were not entitled to be treated as protected prisoners of war. Although the burden of proof of guilt is always on the prosecution, this does not mean that a further burden is laid on it to prove that an accused person has no right to apply for postponement of his trial until certain procedural steps have been taken.'

In the case of Chai it was held that a doubt had arisen when the issue of citizenship had been raised at the trial court, and the appeal was allowed as there had been a mistrial.<sup>2</sup> The decision in this case was one of the causes of the dissenting judgment delivered by Lord Guest and Sir Garfield Barwick. In their view<sup>3</sup> that accused had not raised the appropriate claim but had made a point about jurisdiction only; and 'in any case he did not press the claim he did make and certainly did not evidence his status as a prisoner of war'.

It would seem that their lordships regarded the protective consequence of doubtful status to be a matter of privilege to be claimed.<sup>4</sup> It is not at all certain that this approach is consonant with the general tenor of the Convention.<sup>5</sup> A proper test might be: would a court reasonably have entertained a doubt in all the circumstances of the case? It is probably putting it too strongly to say that the prosecution has a burden on the issue and no doubt a court might call for further evidence to be produced by both sides.<sup>6</sup>

<sup>1</sup> p. 855.

<sup>2</sup> pp. 859-60.

<sup>3</sup> pp. 864-6.

<sup>4</sup> This is evident especially in the dissenting judgment.

<sup>5</sup> See, for example, Article 7, which provides that prisoners of war may in no circumstances renounce their rights under the Convention.

<sup>6</sup> Circumstances may be thought to create doubt: see Directive Number 20-5 of 15 March

In the possibly analogous case of diplomatic immunity as a plea to jurisdiction, entitlement does not depend on a claim by the person entitled.

*Law of war—Geneva Convention Relative to the Treatment of Prisoners of War, Article 4—members of armed forces engaged in sabotage in civilian clothes*

*Case No. 8. Osman Bin Haji Mohamed Ali and Another v. Public Prosecutor*, [1969] 1 A.C. 430, P.C. This appeal arose against the background of the 'confrontation' between Malaysia and Indonesia and was determined on the assumption that the Geneva Convention applied to Singapore and also that at the material time there was a state of armed conflict between Malaysia and Indonesia. On 10 March 1965 two employees at a bank in Singapore and a third person were killed as a consequence of an explosion caused by a large charge of nitroglycerine placed by the two appellants on the stairs of the building. The appellants were not wearing uniform then nor later when arrested. They were charged with murder under the Penal Code and tried under regulations made pursuant to the Emergency (Essential Powers) Act, 1964. The appellants claimed to be entitled to the status of prisoners of war under the Geneva Convention as members of the Indonesian armed forces. The trial judge found that they were not so entitled, the Federal Court of Malaysia upheld the convictions and the appellants now came to the Privy Council. One basis of appeal, which was unsuccessful, concerned matters of Malaysian constitutional law. The other basis of the appeal was the argument that the appellants were prisoners of war and that, as the requirements of the Geneva Convention relating to doubtful status of detainees had not been observed, there had been a mistrial.

The first submission for the appellants on this issue was to the effect that under Article 4 A (1) of the Convention members of armed forces captured out of uniform were prisoners of war. The requirements of Article 4 A (2) should not be read into 4 A (1) and therefore the absence of a distinctive sign was not conclusive against the appellants. Secondly, it was argued that sabotage was a species of war crime and saboteurs were not to be equated with spies. In this connection it was stated that the status of prisoner of war obtained for those convicted of war crimes and *a fortiori* for those not yet convicted.

The Privy Council referred to the categories of persons in Article 4 of the Convention and observed that it does not suffice in every case to establish membership of an armed force to become entitled on capture to treatment as a prisoner of war. As a further preliminary their lordships stated that international law recognized the necessity of distinguishing between belligerents and peaceful inhabitants: hence, the importance of the former wearing 'a fixed distinctive sign recognizable at a distance'. This requirement must apply to members of regular armed forces and not merely to members of militias and volunteer corps. The opinion of the Board then referred to various authorities<sup>1</sup> for the proposition that saboteurs dressed in civilian clothes who were members of regular armed forces were not entitled to be treated as prisoners of war on capture. The exposition of the law by their lordships is unexceptionable and is helpful in

1968, Headquarters, U.S. Military Assistance Command in Vietnam, para. 5, *American Journal of International Law*, 62 (1968), at p. 769.

<sup>1</sup> Including the decision of the U.S. Supreme Court in *Ex parte Quirin* (1942), 317 U.S. 1, 31. Other cases on this point are: *Stanislaus Krofan v. Public Prosecutor*, [1967] Malayan L.J. 133; and *Osman v. Public Prosecutor*, *ibid.* 137, both being decisions of the Federal Court of Malaysia (the latter decision was the object of the present appeal); *Colepaugh v. Looney*, *International Law Reports*, 23 (1956), p. 759. See further *In re Dostler*, *Annual Digest*, 13 (1946), p. 280; *In re Buck*, *ibid.*, p. 293.

its emphasis on the distinction between belligerents and others. The case has an unsatisfactory aspect, however. This was a situation in which there was continuing doubt as to the status of the appellants and, in fact, their lordships decided the appeal on the hypothesis that the appellants were members of the Indonesian armed forces. The trial court had decided negatively on the issue of status but lacked certain evidence which was only available after the hearing of the appeal by the Federal Court. Thus the assumptions of the trial court and the Federal Court as to the unprivileged position of the appellants<sup>1</sup> were based upon reasoning which related to *irregular* combatants failing to comply with the requirements of lawful belligerency. However, this putative error could hardly be held to justify the finding that a mistrial had occurred in a situation where the trial court may have made an incomplete inquiry as to citizenship but nevertheless reached a correct conclusion on the existence of unprivileged belligerency.<sup>2</sup>

IAN BROWNLIE

## B. PRIVATE INTERNATIONAL LAW\*

### *The domicil of an infant*

*Case No. 1.* It is a generally accepted rule that the domicil of origin of a legitimate child (unless posthumously born) is that of the father at the time of birth and that during infancy (the case of the female infant who marries apart) his or her domicil follows and remains with that of the father. In the case of an illegitimate or posthumous child it is the domicil of the mother that controls. Why should this be so? What policy requires that the domicil of a child should be dependent upon that of a parent? Why should a person be irrebuttably presumed to belong to the community to which that parent belongs—regardless of actual circumstances—until the moment in time at which according to English domestic law he traditionally becomes of full age? Such questions are not free from difficulty and the answers are not easily discernible. One is tempted to reflect that, although the rules relating to the domicil of an infant have generally speaking<sup>3</sup> an attractive and simple clarity, it is a clarity born of the rigid formulation of arbitrary principles unrelated to any readily identifiable policy justification.

The actual decision in the recent Northern Irish case of *Hope v. Hope*<sup>4</sup> was that the Northern Ireland High Court had divorce jurisdiction based upon the domicil of a male infant petitioner notwithstanding the fact that at the time of the institution of the proceedings the petitioner's father was domiciled in England. The petitioner had been born legitimate, but some ten years before the instant proceedings his parents had been divorced. The decree had been granted on the ground of his father's adultery, and custody of the children (including the present petitioner) had been given to his mother. The Lord Chief Justice of Northern Ireland said, 'The ordinary rule is that the domicil of an infant follows any change that may occur in the domicil of his father. In Cheshire, *Private International Law* (7th ed., 1965), p. 166, that rule is referred to as "being generally laid down in absolute terms". But the learned author hopes that it may not be pressed to its logical conclusion, and after giving a couple of possible

<sup>1</sup> See the opinion of the Board at pp. 445–6.

<sup>2</sup> See also *Public Prosecutor v. Oie Hee Koi*, *Case No. 7*, above, pp. 234–8.

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<sup>3</sup> There is, however, authority which mitigates this in certain cases in which the child is fatherless: *Re Beaumont*, [1893] 3 Ch. 490.

<sup>4</sup> [1968] N.I. 1.



instances (including that of a father divorced for adultery and the custody of the children given to his wife) goes on to observe: "In such cases as these it is scarcely credible that a court would affirm the inevitability of a common domicile." This suggests that the exact issue now before me is not the subject of decision binding upon this court, and I believe that to be the position.<sup>1</sup> Lord MacDermott held that upon the parents' divorce and the award of custody the domicile of the mother had replaced that of the father as the control of the child's domicile. No English authority was available. Lord MacDermott did, however, refer to *Shanks v. Shanks*,<sup>2</sup> a Scots case decided in 1965, in which on apparently similar facts an opposing view was taken, it being held there that the dependence of the infant's domicile upon that of its father is not broken by divorce even if custody is awarded to the mother. The Lord Chief Justice of Northern Ireland conceded that this might indicate a difference between Scots and English law.

*Hope v. Hope* as a decision thus makes new law, but what is perhaps of larger interest is the principle by reference to which the decision was justified. Speaking of the rule that the domicile of an infant is dependent upon that of a parent, Lord MacDermott said:

On principle, it would seem that this rule must be based on the authority and responsibility that a father has to act for his child; and it is, I think, clear that on the death of the father his capacity to change the child's domicile will ordinarily pass to the surviving parent. This recognises the rule as a manifestation of parental authority and responsibility. But why should it apply to tie the domicile of the child to the will of a father who has abjured his responsibility by walking out of his child's life and by so conducting himself that his marriage is dissolved by a competent court which grants custody of the child to the mother? In such a case the status and position of the father to which the rule is related have gone, and the mother has become the parent in charge and responsible for the welfare of the child. It would seem to me, therefore, that in an instance like the present the mother's choice of domicile will affect that of the child. The petitioner's mother, having been given custody, decided to come back to what had been her own country and to start life afresh there with her son. She reacquired her Northern Ireland domicile. Why should this not restore her son's domicile of origin? I see no reason why not, and on the ground just stated, I think that view accords with the true nature of the rule and should not be regarded as an exception to it.<sup>3</sup>

The doctrine propounded is that the dependency of an infant's domicile is based upon the notion of a parent's authority and responsibility to act for the child. When this responsibility is abandoned the authority is forfeit and dependency of domicile is broken. The second example given by Dr. Cheshire (in the passage in his treatise referred to by Lord MacDermott) of a situation in which the bond of dependency ought to be regarded as broken seems to provide a further illustration of this approach. The learned author puts the case of a father who 'deserts his son, leaves him in his domicile of origin and himself acquires a fresh domicile elsewhere'.<sup>4</sup>

An element of flexibility (and concomitant complexity) has for some time been admitted in another part of the law relating to an infant's domicile. In *Re Beaumont*<sup>5</sup>

<sup>1</sup> [1968] N.I. 1, 4.

<sup>2</sup> [1965] S.L.T. 44.

<sup>3</sup> *Ibid.*, pp. 4-5.

<sup>4</sup> Cheshire, *Private International Law* (7th ed., 1965), p. 166. This was recently accepted in the High Court of Allahabad in *Rashid Hasan v. Union of India*, A.I.R. 1967, All. 154. There a petitioner was born in India of Indian parents. While still an infant he was deserted by his father who migrated to Pakistan, and became a national there, leaving the petitioner in India. It was held that the petitioner had retained his domicile of origin notwithstanding that during his infancy his father had acquired a domicile of choice in Pakistan.

<sup>5</sup> [1893] 3 Ch. 490.

it was held that the remarriage of a widow, whereby she herself acquired a new domicile by operation of law, did not of itself affect the domicile of her infant children. There, however, the governing principle seems to have been conceived rather differently: the emphasis was placed upon the best interests of the infant rather than upon considerations of the responsibility and authority of the parent as such. Stirling J. said 'the change in the domicile of an infant which . . . may follow from a change of domicile on the part of the mother, is not to be regarded as a necessary consequence of a change of the mother's domicile, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which, in their interest, she may abstain from exercising, even when she changes her own domicile'.<sup>1</sup>

As a decision *Hope v. Hope* is in the tradition of *Re Beaumont* in that it involves rejection of the notion that in all cases a change in the relevant parent's domicile will automatically cause a corresponding change in an infant's domicile. This negation of blind adherence to an arbitrary and oversimplified rule is welcome. But more fundamental issues remain unresolved. The domicile of an infant, like the domicile of anyone else, should connote the law which is most appropriate to govern certain questions. The width of the range of these questions probably requires that the definition of domicile should be an accommodating one. It is, however, hard to see why the subjective interests of the infant, as such, should be worthy of particular consideration in this context. To this extent the philosophy of *Re Beaumont* is vitiated. Again it is difficult to see why the authority and responsibility of the parent is a matter for particular concern. It is on this score that the philosophy of *Hope v. Hope* is, it is submitted, open to question. The ultimate test of the rightness of a determination of a person's domicile, whatever his age, must be the appropriateness of the law of that country to govern a wide range of issues or, perhaps, more particularly the issue before the court. It is the community to which the *propositus*, be he an adult or an infant, can with objectivity be said to belong. There is no compelling reason to hold that an infant belongs to a community because it would be in his best interests to do so. Again an infant does not necessarily belong to a community because a parent exercising authority over him and accepting responsibility for him belongs to it: such a circumstance is evidence, often strong evidence, but it is no more.

Difficulty in rationalizing the dependency of an infant's domicile upon that of a parent provokes reflection as to whether this dependency is justified at all or at least as to whether it is justified in its present extent. The consideration given to this problem by the Committee on the Age of Majority was disappointingly cursory. That Committee simply recommended that all persons other than married women should be able to acquire an independent domicile at 18.<sup>2</sup> This is to be seen in the context of the Committee's main recommendation that the age of majority generally should be reduced from 21 to 18. It may, however, well be doubted whether the end of dependency in matters of domicile ought necessarily to coincide with the age of majority in domestic law. Even in matters of domestic law the age of full capacity varies—for instance the ages at which a person may be held criminally responsible, at which he may marry and at which he may contract all differ in English law. Again in some areas of domestic law, such as tortious liability and testimonial competence, no precise age is prescribed. There is certainly no *a priori* reason why dependency of domicile should be geared to the age of majority.

The notion of domicile as developed in Common Law countries involves a mental

<sup>1</sup> Ibid., pp. 396–7.

<sup>2</sup> *Report of the Committee on the Age of Majority* (1967), Cmnd. 3342, pp. 121–2.

element. The *propositus* must have made a responsible, if subconscious, choice. Clearly, therefore, a child cannot from birth be allowed to determine his own domicile. Resort has to be had to some rule of dependency until at least the child is old enough to form a settled intention. Whether the law should generalize about this point in a child's development and formulate a rule in terms of a specific age is perhaps an open question. But the appropriate age, whether precisely defined or not, is clearly less than 21 or even 18. It is indeed extraordinary, for instance, that the law should credit a young person with sufficient judgment to decide whether or not to marry at an age earlier than that at which it credits him with capacity to form a present intention to remain in the place in which he resides.

### *Capacity to marry*

*Case No. 2.* The facts leading to the decision of the Divisional Court in *R. v. Brentwood Superintendent Registrar of Marriages, Ex parte Arias*<sup>1</sup> were that a male Italian national domiciled in Switzerland wished to marry in England a female Spanish national also domiciled in Switzerland, both intending after the marriage to return to Switzerland and to set up their matrimonial home there. The Registrar refused to issue a marriage certificate, and the lady applied for an order of *mandamus* directing him to do so. The Divisional Court dismissed this application on the ground that the projected husband lacked capacity to marry: he had previously been married to and divorced from a Swiss woman, who had herself subsequently remarried, but according to Swiss law he was not free to do likewise.

The decision reflects adherence to the principle that the law of the domicile controls capacity to marry, especially if both the antenuptial domicile of the parties and their intended matrimonial domicile are the same. Sachs L.J., who delivered the judgment of the Court, cited, apparently with approval, Rule 31 of *Dicey and Morris* to the effect that 'Capacity to marry is governed by the law of each party's antenuptial domicile.'<sup>2</sup> It would thus seem that it was the fact that the parties, or at least the man, was domiciled in Switzerland, rather than the parties' intention to set up a matrimonial home there, that was decisive. Realists, however, may at least wonder whether the Court's decision would have been the same had the facts been that the parties, although still domiciled in Switzerland, clearly intended if allowed to marry to spend the rest of their days in England. The actual facts were that the parties had come to England briefly for the one purpose of marrying.

The man's former marriage had taken place in Switzerland, he himself being already domiciled in Switzerland and his wife being a Swiss national domiciled in Switzerland. This marriage was subsequently dissolved by a Swiss court. It is to be noted that the reason why in these circumstances he was, nevertheless, not accorded in Swiss eyes the capacity to remarry was that he had remained throughout an Italian national. The English court accepted the Swiss reference on to the law of the nationality of the question of capacity to marry. *R. v. Brentwood Superintendent Registrar of Marriages, Ex parte Arias* thus furnishes a simple example of the operation of the doctrine of *renvoi* in a particular area of private international law in which it has not hitherto been shown to play much part. There is, of course, authority that the doctrine is applicable in other parts of the law relating to status, for example in cases of legitimacy (*Re Askew*<sup>3</sup>), of recognition of foreign divorces (*Armitage v. Attorney-General*<sup>4</sup>), of recognition of

<sup>1</sup> [1968] 2 Q.B. 956.

<sup>2</sup> *Dicey and Morris, The Conflict of Laws* (8th ed., 1967), p. 254 cited by Sachs L.J. at p. 968 *ibid.*

<sup>3</sup> [1930] 2 Ch. 259.

<sup>4</sup> [1906] P. 135.



foreign nullity decrees (*Abate v. Abate*<sup>1</sup>) and even of the formal validity of marriage (*Taczanowska v. Taczanowski*<sup>2</sup> and *Hooper v. Hooper*<sup>3</sup>). Its corresponding application in a case concerned with capacity to marry is consistent with a general principle that the doctrine of *renvoi* is appropriate throughout the English private international law of status.

The particular facts of the case under discussion bear a superficial resemblance to those of *Scott v. Attorney-General*.<sup>4</sup> In that case a husband domiciled in South Africa had obtained a divorce there on the ground of the wife's adultery. The wife subsequently came to England and remarried in spite of a South African law which prohibited re-marriage by the 'guilty' party after a divorce for so long as the innocent party remained alive and unmarried. The English marriage was held to be valid. It is to be noted that there, unlike in the instant case, the party under the disability did not intend to remain in the country in which it had been imposed. But a crucial difference is that the South African rule, unlike the Swiss rule, was penal in its nature. Its purpose was to punish the 'guilty' party, whereas the Swiss rule simply reflected respect for the personal law as the law properly governing questions of status, which in Switzerland (as in most Civil Law countries) is the law of the nationality.

It was urged in the *Brentwood Superintendent Registrar of Marriages* case that, by way of exception to the domicile principle which obtains in the English courts, the Swiss incapacity should be disregarded on the ground that 'because of its discrimination between husband and wife or because it was penal or because it involved factors, religious or otherwise, which this country would disregard, the Swiss law was, to use the phraseology of Sir Jocelyn Simon P. in *Cheni (or se Rodriguez) v. Cheni*,<sup>5</sup> a case decided in 1962: "... so offensive to the conscience of English courts that they should refuse to recognise and give effect to it".<sup>6</sup> This line of argumentation was decisively, and it is respectfully submitted, very properly, rejected by the Court. Sachs L.J. cited<sup>7</sup> Pearce J. in *Igra v. Igra*: 'Different countries have different personal laws, different standards of justice and different practice. The interests of comity are not served if one country is too eager to criticise the standards of another country or too reluctant to recognise decrees that are valid by the law of the domicile.'<sup>8</sup> *Igra v. Igra* was, of course, a case concerned with the recognition of a foreign divorce, but Sachs L.J. added 'Mutatis mutandis, to my mind, that passage applies equally where questions of capacity to marry come under consideration.'<sup>9</sup>

The court further held that, even if it had been satisfied that the foreign incapacity was so intrinsically objectionable to English policy that it should be disregarded in England, *mandamus* would not have been available. 'Whether an order of *mandamus* issues is always a matter of discretion; and even if the registrar had erred in law it would be wholly wrong to issue such an order simply to assist the parties to the proposed

<sup>1</sup> [1961] P. 29.

<sup>2</sup> [1957] P. 301.

<sup>3</sup> [1959] 1 W.L.R. 1021.

<sup>4</sup> (1886), 11 P.D. 128; cf. *Warter v. Warter* (1890), 15 P.D. 152.

<sup>5</sup> [1965] P. 85, 89.

<sup>6</sup> Per Sachs L.J. at p. 968 *ibid.*

<sup>7</sup> At p. 969 *ibid.*

<sup>8</sup> [1951] P. 404, 412.

<sup>9</sup> At p. 969 *ibid.* The learned Lord Justice let drop in this context a nicely barbed dictum about English divorce jurisdiction: 'One might perhaps add that those who live in legal glass houses, however well constructed, should perhaps not be over-astute to throw stones at the laws of other countries. Our own divorce laws have facets which may well seem unusual to or even to lack attractions for those who apply a continental system of jurisprudence. For instance, as a result of section 40 (1) of the Matrimonial Causes Act, 1965, an Italian wife after residing for three years in this country can secure a decree of divorce against an Italian domiciled husband, yet the husband in question is not entitled in the proceedings here to cross-petition for divorce against the wife even though the offence of which he complains is graver and earlier than that complained of by her.'

marriage to circumvent personal laws valid in another country relating to status. That view applies even if the law of that country does not conform with views held in this country.<sup>1</sup> Especially relevant factors in the exercise of the court's discretion would include the circumstance that not only one but both parties were domiciled in Switzerland, the fact that it is 'no part of the functions of an English court to arrogate to itself the task of seeking in effect to impose on another country its views as to what should or should not be the law in relation to the capacity of parties domiciled there to marry',<sup>2</sup> and the undesirability of promoting the 'scandal of marriages which are valid in one country but not valid in other countries'.<sup>3</sup>

The Court's reference in the instant context to the nature of *mandamus* would seem clearly to indicate that sometimes a distinction must be drawn between cases in which a ceremony has actually taken place and those in which in otherwise similar circumstances it has not. In other words there may be cases in which an English court would be willing to disregard a foreign incapacity (as being obnoxious to policy) and thus to recognize the validity of ceremony which has already been performed, whereas it would have been unwilling to allow *mandamus* to issue in order to promote that ceremony. The implications in private international law of such a distinction are quite wide. A person domiciled in a country where the age of marriage is 15 who had gone through a ceremony when 15½ would (assuming the other party had capacity and the marriage was valid in point of form by the *lex loci celebrationis*) be regarded as thereby validly married, although an English registrar might not have been directed to perform a ceremony in such circumstances. A practical consequence of the distinction is that so far as marriages taking place in England are concerned the role of the *lex loci celebrationis* is by no means confined to formalities. Relatively few marriages will in fact take place in England where the parties lack capacity according to the criteria of English domestic law—this being, of course, without prejudice to the necessity of satisfying as well the requirements of the domiciliary law, should the party in question be domiciled abroad and/or the intended matrimonial domicile be abroad.

#### *Nullity jurisdiction and choice of law*

*Case No. 3.* In *Padolecchia v Padolecchia*<sup>4</sup> a husband was petitioning for a decree of nullity on the ground that at the time of the ceremony of marriage he was still validly married to another woman. Sir Jocelyn Simon P. had to decide an issue of jurisdiction and an issue of choice of law. Neither determination makes new law: the case is interesting for the learned President's dicta rather than for the decisions which it embodies.

The facts were these. The petitioner, who never lost his Italian domicile of origin, had in 1953 married an Italian woman in Italy. In 1957 he went to Venezuela and while living (but not domiciled) there he had obtained a Mexican divorce. This divorce, it was conceded, would be recognized in Venezuela but it would not be recognized in Italy. In 1963 the petitioner moved to Denmark where he met the respondent, a woman domiciled and resident in Denmark. In 1964 the couple came to England on a one-day visit and went through a ceremony of marriage at an English Registry Office. At the time of this ceremony the petitioner's Italian wife was still alive.

The first question which Sir Jocelyn Simon P. had to decide was that of jurisdiction. Simply as a matter of authority this presented no great difficulty. Bigamy renders a marriage void *ab initio* not merely voidable. As recently as 1963 the House of Lords in *Ross-Smith v. Ross-Smith*<sup>5</sup> declined to overrule *Simonin v. Mallac*<sup>6</sup> as it affects void

<sup>1</sup> [1968] 2 Q.B. 956, 970.

<sup>2</sup> *Ibid.*, at p. 971.

<sup>3</sup> *Ibid.*, at p. 971.

<sup>4</sup> [1968] P. 314.

<sup>5</sup> [1963] A.C. 280.

<sup>6</sup> (1860), 2 Sw. & Tr. 67.



marriages: in such cases the mere fact that the ceremony took place in England is sufficient to ground nullity jurisdiction. The actual decision in *Ross-Smith v. Ross-Smith* was that by contrast the circumstance of celebration in England is not a sufficient basis for jurisdiction in cases of voidable marriages. The applicability of the *Simonin v. Mallac* doctrine even in the case of a void marriage was the subject of adverse comment by several of their Lordships, but it is clear that there was no majority in favour of formally overruling it.<sup>1</sup> Sir Jocelyn Simon P. has now confirmed that '*Simonin v. Mallac* and the cases which followed it are still authority for the jurisdiction in nullity of the English Court in cases where the marriage is alleged to be void *ipso jure*.'<sup>2</sup> In doing so he quoted with approval Diplock L.J.'s reference in 1964 to the House of Lords 'anomalously perpetuating early error'<sup>3</sup> in refusing to overrule *Simonin v. Mallac*. The learned President, nevertheless, saw some justification for it. This justification lay in considerations of what he described (with perhaps curious felicity) as 'public convenience'. He said 'First, the court of the place of ceremony is especially well qualified to decide on validity of marriage in point of form. In other words, in certain types of marriage alleged to be void *ipso jure* it is convenient if the *lex fori* and the *lex loci celebrationis* coincide; and it would be a confusing complication to attempt to distinguish between one kind of marriage void *ipso jure* and another: see Lord Hodson in *Ross-Smith v. Ross-Smith*. Secondly, the country of celebration has a particular interest in correcting its civil registers.'<sup>4</sup> It is submitted with respect that neither of these reasons seems particularly compelling. It is hard to see why expert testimony as to foreign formal requirements is likely to be less trustworthy than other expert testimony as to foreign law, or why witnesses of foreign ceremonies are likely to be less reliable than witnesses of English ceremonies. Moreover, many cases of voidness (including *Padolecchia v. Padolecchia* itself) are not concerned with defects of form. The automatic correction of an English civil register may in practice be more likely to result from the issue of an English nullity decree than from the issue of such a decree by a jurisdictionally competent foreign court. But the degree of bureaucratic efficiency with which corrections are made, or indeed whether they are made at all, will seldom be a matter of moment. Moreover, it is to be remembered that a void marriage is no marriage even in the absence of any decree or correction of register.

The facts of *Padolecchia v. Padolecchia* provide a strong illustration of the absurdity to which the House of Lords' failure to overrule *Simonin v. Mallac* can lead. Neither the petitioner nor the respondent had, or had ever had, any connection with England apart from a one-day visit made for the sole purpose of going through a marriage ceremony. Three years later (and it would have made no difference had it been thirty years later) an English judge was constrained to pronounce upon their status as man and wife. It is no matter for surprise that as the learned President concluded 'I cannot expect my decision to command international recognition'.<sup>5</sup>

So far as choice of law is concerned the actual decision in the *Padolecchia* case is simple. In English nullity proceedings questions of voidness (*sed quaere* of voidability) are treated as questions pertaining to the original validity of the marriage. The question in the instant case was as to the petitioner's capacity. He was domiciled in Italy, and by Italian law he was still married to his first wife. He therefore lacked capacity, and the English 'marriage' was accordingly void *ab initio*.

Sir Jocelyn Simon P. discussed *obiter* a more difficult question. It was conceded that the petitioner's Mexican decree would be recognized in Venezuela. Had the

<sup>1</sup> See this *Year Book*, 38 (1962), pp. 489-93.

<sup>2</sup> [1968] P. 314, 334.

<sup>3</sup> *Garthwaite v. Garthwaite*, [1964] P. 356 *per* Diplock L.J. at p. 391.

<sup>4</sup> [1968] P. 314, 335.

<sup>5</sup> *Ibid.*, p. 335.



petitioner been domiciled in Venezuela at the time of that decree but reacquired his Italian domicile before the English ceremony, a problem similar to, but not identical with, that found in the Canadian case of *Schwebel v. Ungar*<sup>1</sup> would have arisen. The Mexican divorce would have been recognizable in England under the doctrine of *Armitage v. A.-G.*<sup>2</sup> At the same time the petitioner would have lacked capacity to marry under his personal, Italian law, because the Mexican divorce would not be recognized in Italy. In these circumstances the learned President would have still held the marriage void. He accepted the philosophy of *Schwebel v. Ungar* where, he said, '[t]he capacity of a person to marry was held to be governed by his or her domicile at the time of the marriage and not according to the validity of his or her antecedent divorce.'<sup>3</sup> In *Schwebel v. Ungar* itself the antecedent divorce was not recognizable according to the conflicts rule of the Ontario *forum*, but the divorcee had capacity by her personal law at the time of the second ceremony. That second ceremony (which had taken place in Ontario) was held by the Supreme Court of Canada to be valid. In the situation envisaged in *Padolecchia v. Padolecchia*, although the facts are the converse of those in *Schwebel v. Ungar*, the principle which the learned President would have applied is the same. An element of *renvoi* is introduced into the rules relating to capacity to marry,<sup>4</sup> and it is propounded that, should a preliminary question of the validity of a prior divorce arise incidentally in the context of capacity to marry, it will be answered by reference to the law governing the main capacity question.

#### *Recognition of polygamous marriages*

*Case No. 4.* The decision of the Divisional Court in *Alhaji Mohamed v. Knott*<sup>5</sup> provides on somewhat striking facts a further illustration of the proposition that a valid polygamous marriage will in the absence of a particular rule to the contrary generally be recognized in England. There Lord Parker C.J., delivering the judgment of the Court, expressly approved the position as set out in Rule 37<sup>6</sup> of the 7th edition of Dicey's *Conflict of Laws*, to the effect that a valid polygamous marriage 'will be recognised in England as a valid marriage unless there is some strong reason to the contrary'.<sup>7</sup>

A Nigerian aged twenty-six had entered into a valid polygamous marriage in Nigeria with a Nigerian aged thirteen years and two weeks. Three months later the parties came to England where the man was a medical student. The parties intended after he had completed his studies to return to Nigeria. In June 1967, the girl then being 13½ years old, a complaint was preferred before an English Juvenile Court that she was in need of care, protection or control in that she was not receiving such care and guidance as a good parent might reasonably be expected to give and was exposed to moral danger within Section 2 of the Children and Young Persons Act, 1963.<sup>8</sup>

The Justices took the view that, whether or not the Nigerian marriage was recognized as valid, the girl was exposed to moral danger and that continuance of the association between herself and the man notwithstanding the marriage would be repugnant to any decent-minded Englishman or woman. They found the complaint proved and ordered that the girl be committed to the Local Authority.

<sup>1</sup> (1964), 42 D.L.R. (2d.) 622.

<sup>2</sup> [1906] P. 135.

<sup>3</sup> [1968] P. 314, 339.

<sup>4</sup> See note on *Case No. 2*, above, pp. 242-3.

<sup>5</sup> [1969] 1 Q.B. 1.

<sup>6</sup> Now Rule 36 in Dicey and Morris, *The Conflict of Laws* (8th ed., 1967).

<sup>7</sup> [1969] 1 Q.B. 1, 13-14.

<sup>8</sup> Section 2 provides '(1) A child or young person is in need of care, protection or control . . . if—(a) any of the conditions mentioned in sub-section (2) of this section is satisfied with respect to him, and he is not receiving such care, protection and guidance as a good parent may reasonably be expected to give . . . (2) The conditions referred to in subsection 1 (a) . . . are that (a) he is . . . exposed to moral danger. . . .'

On appeal the Divisional Court reversed the Justices' decision and ordered that the committal be revoked. The Court held that the Nigerian marriage, although potentially polygamous, was valid and would be recognized in England so as to give the girl the status of wife. In the instant context there was no sufficiently strong reason to justify departure from the general rule that a valid polygamous marriage is to be accorded the same respect as a valid monogamous marriage. This did not necessarily conclude the matter as it is possible for an order to be made pursuant to Section 2 in respect of a wife validly married to a husband. In the present case, however, the Court was unwilling to hold that the girl was exposed to moral danger within the Section merely because she carried out her wifely duties.

In passing the Lord Chief Justice considered whether sexual intercourse between the man and his wife in England constituted the offence of 'unlawful sexual intercourse with a girl . . . under the age of 16' contrary to Section 6 (1) of the Sexual Offences Act, 1956. Lord Parker C.J. expressed the view that the police could not ever properly prosecute if the marriage is one recognized in England and that, if a prosecution was brought it might well be held that intercourse between man and wife is not 'unlawful' within the section. While respectfully agreeing with this, it may be added that there would in any event seem to be no justification for distinguishing between monogamous and polygamous marriages in interpreting the section. It is submitted that the only doubt (if any) could be as to whether the section is intended to apply in the case of a wife under 16, not as to whether it is intended to apply in the case of a polygamist's wife.

#### *Recognition of foreign divorces*

*Cases Nos. 5 and 6.* The decision of Sir Jocelyn Simon P. in *Mayfield v. Mayfield*<sup>1</sup> and that of Payne J. in *Mather v. Mahoney*<sup>2</sup> add to the case law<sup>3</sup> elaborating and clarifying some of the implications of the doctrine recently laid down by the House of Lords in *Indyka v. Indyka*,<sup>4</sup> itself a landmark in the law relating to the recognition of foreign divorces.

*Mayfield v. Mayfield* concerned a husband who was a British Subject, a citizen of the United Kingdom and Colonies, domiciled and resident in England, and his wife, a German national, who after the marriage acquired dual nationality and was, of course, domiciled by operation of law in England. The parties had separated, and the wife had returned to Germany where she had taken up residence. Subsequently the husband had sought and obtained from a German court a decree of divorce. The German court assumed jurisdiction on the basis of the wife's nationality and her permanent residence in Germany. The husband then instituted the instant English proceedings for a declaration that the marriage had been validly dissolved by the German decree; or, alternatively, for a decree of divorce on the ground of the wife's desertion. The learned President, holding the case to be within the scope of the *Indyka* doctrine, recognized the German decree and made a declaration accordingly.<sup>5</sup>

The interesting point in the case is that it was the husband, a person who had no close, real or substantial connection with the foreign forum who had obtained the foreign decree. That there was sufficient connection between the wife and Germany to satisfy

<sup>1</sup> [1969] 2 W.L.R. 1002.

<sup>2</sup> [1968] 1 W.L.R. 1773.

<sup>3</sup> See this *Year Book*, 42 (1967), pp. 302-5 for commentary on other cases *Angelo v. Angelo*, [1968] 1 W.L.R. 401; *Peters v. Peters*, [1968] P. 275; *Tijanic v. Tijanic*, [1968] P. 181 and *Brown v. Brown*, [1968] P. 518.

<sup>4</sup> [1969] 1 A.C. 33.

<sup>5</sup> Sir Jocelyn Simon P. did indicate *obiter* that the petitioner had proved desertion and that, had the question arisen, discretion would have been exercised in his favour.



the *Indyka* rule had she instituted the proceedings was clear. The learned President asked: Is it

‘a material distinction that the proceedings were brought by the husband, who had no close or real or substantial connection with Germany, and not the wife? In my view, the difference is not material. What is the material fact is that the German decree operated on the status of the wife, who had such close, substantial and real connection. If it operated on the status of the wife and should be recognised as such, for the reasons which I ventured to give in *Lepre v. Lepre*, [1965] P. 52, 61–63, we should recognise the decree as also operating on the status of the husband.’<sup>1</sup>

In *Lepre v. Lepre* the learned President had rejected what he there castigated as the ‘schizoid’ notion that W might be married to H although H is not married to W; and, indeed, in the instant case it would have been indefensible to hold that the effect of the German divorce decree was to release the wife but not the husband from the bonds of matrimony. This does not, however, it is submitted with respect, bear directly upon the question as to whether the German decree should be recognized at all. Of course, ‘the German decree operated on the status of the wife’ (and of the husband) according to German law, but this *per se* does not entitle it to international recognition. To assume that it has any international operation begs the question. The real justification for recognizing a foreign decree in a situation such as that presented in *Mayfield v. Mayfield* would seem to lie, not in the self-evident truth that it would be ‘schizoid’ to hold that W is no longer married to H although H is still married to W, nor in the fact that the foreign decree is operative in the foreign forum, but rather in the absence of any convincing policy requiring, or, indeed, permitting, discrimination between husband and wife or between petitioner and respondent once it is established, as it has been established in *Indyka v. Indyka*, that a sufficiently close, real and substantial connection between a party to a marriage and a country is enough to render the courts of that country jurisdictionally competent to dissolve that marriage.

There is a sense in which *Mayfield v. Mayfield* invites comparison with *Levett v. Levett and Smith*<sup>2</sup> where recognition under the doctrine of *Travers v. Holley*<sup>3</sup> was withheld from a foreign divorce because it had been obtained by a husband. The philosophy of *Travers v. Holley* is simple jurisdictional reciprocity. An English court assumes jurisdiction on the basis of three years’ residence only if the proceedings are instituted by a wife.<sup>4</sup> Although in *Levett v. Levett and Smith* the husband had in fact obtained his decree as the result of a cross-petition which he (as respondent) had presented in German divorce proceedings instituted by his wife, the Court of Appeal held that the statute giving jurisdiction to the English courts, and thus the *Travers v. Holley* doctrine, were designed to make relief available to wives but not to husbands. Seemingly it would have made no difference had the husband himself been continuously resident in Germany for three or more years immediately prior to the decree. The discrimination between husband and wife implicit in *Levett v. Levett and Smith* is but a mirror image of the discrimination propounded in the English jurisdiction-giving statute. The felicity of the provisions of that statute, and the merits of crude jurisdictional reciprocity as a basis for the recognition of foreign decrees, are both open to serious doubt. However, they are matters which have no relevance in such a case as *Mayfield v. Mayfield*, where what fell for interpretation was the scope of the broader, more generous and more policy-orientated doctrine of *Indyka v. Indyka*.

<sup>1</sup> [1969] 2 W.L.R. 1002, 1003.

<sup>2</sup> [1957] P. 156.

<sup>3</sup> [1953] P. 246.

<sup>4</sup> Matrimonial Causes Act, 1950, s. 18 (1) (b), now Matrimonial Causes Act, 1965, s. 40 (1) (b).



*Mather v. Mahoney*<sup>1</sup> is somewhat surprisingly reported in Volume 1 of the Weekly Law Reports. Despite this and despite the fact that Payne J.'s judgment occupies little more than one page and is devoted very largely to a recitation of the facts, it would appear to be a decision of some importance.

The husband, who had been born in Scotland, acquired a domicile of choice in England. This he retained at all relevant times. In 1961 he married in Rome a woman who had lived most of her life in Pennsylvania. The parties thereafter lived together (where does not clearly emerge) for rather more than three years. In 1964 the wife left her husband and returned to the United States. The following year she obtained a decree of dissolution of the marriage in Nevada on the ground of mental cruelty. She had gone to the State of Nevada for the express purpose of obtaining this decree. In subsequent English proceedings the husband petitioned for a declaration that the Nevada decree had validly dissolved the marriage, or alternatively, for a decree *nisi* of divorce on the ground of the wife's desertion. Payne J. held that the Nevada decree must be recognized as effective in England: the question of his pronouncing a decree *nisi* did not therefore arise.

The learned judge held that the Nevada decree was entitled to recognition in England because it would be recognized in Pennsylvania and 'the wife at the time of the decree had a substantial connection with Pennsylvania'. The doctrine of *Armitage v. Attorney-General*<sup>2</sup> is thus in effect neatly grafted on to that of *Indyka v. Indyka*. What is surprising is that the learned judge does not even mention *Armitage*'s case. This is especially surprising in view of the decision in *Mountbatten v. Mountbatten*,<sup>3</sup> in which Davies J. declined in precisely analogous circumstances to graft the *Armitage* doctrine on to that of *Travers v. Holley*.<sup>4</sup> *Armitage v. Attorney-General* established that a foreign divorce will be recognized in England if, although pronounced in a third country, it would be recognized by the courts of the country where at the commencement of the proceedings the parties were domiciled. *Mather v. Mahoney* has decided that, in effect analogously, a foreign divorce will similarly be recognized in England if, although pronounced in a third country, it would be recognized by the courts of the country with which at the time of the commencement of the proceedings<sup>5</sup> the petitioner<sup>6</sup> had a real and substantial connection. The anomalous position of *Mountbatten v. Mountbatten* is made the more marked, for there it was held that the fact that a divorce would be recognized by the courts of a country, the decrees of which would themselves be recognized in England under the *Travers v. Holley* reciprocity doctrine, does not entitle it to recognition in England. The effects of recognition are equated with those of actual pronouncement in the context of the connecting factor of domicile and of that of real and substantial connection but not in the context of that of three years' ordinary residence.<sup>7</sup> The justification of the anomaly may be found in the general desirability of curbing the scope of the *Travers v. Holley* doctrine. Be this as it may, the correctness of the approach taken in *Mather v. Mahoney* is not impugned.

<sup>1</sup> [1968] 1 W.L.R. 1773.

<sup>2</sup> [1906] P. 135.

<sup>3</sup> [1959] P. 43.

<sup>4</sup> [1953] P. 246.

<sup>5</sup> Payne J. in fact said 'at the time of the decree' (*ibid.*, p. 1775). This is in principle wrong; see *Mansell v. Mansell*, [1967] P. 306. Presumably, Payne J. was speaking generally and intended more specifically the time of the commencement of the foreign proceedings.

<sup>6</sup> Since *Mayfield v. Mayfield*, above, it would make no difference if it were the respondent.

<sup>7</sup> *Mountbatten v. Mountbatten* was a case in which an attempt was made to invoke the reciprocity principle with reference to the Matrimonial Causes Act, 1950, s. 18 (1) (b), now Matrimonial Causes Act, 1965, s. 40 (1) (b): presumably the same approach would be taken should a case arise involving reference to s. 40 (1) (a).

The law relating to status constitutes an area in which the doctrine of *renvoi* is generally applicable.

Another point on *Mather v. Mahoney*: the two cases referred to by Payne J. are *Indyka v. Indyka* itself and *Angelo v. Angelo*. He significantly relies 'more precisely upon the authority' of the latter 'because the facts in that case are not in my view distinguishable in any material way from this case'.<sup>1</sup> Of the wife in the instant case, the learned judge said, 'She had the same connection with Pennsylvania as Mrs. Angelo had with Ravensburg', but surprisingly added 'and the same connection which was established between the petitioner and Czechoslovakia in the *Indyka* case.'<sup>2</sup> The identification of, on the one hand, the facts of the *Indyka* case with, on the other hand, those of the *Angelo* case and of *Mather v. Mahoney* conceals the very considerable extension of the scope of the *Indyka* principle which is embodied in the latter cases. It would seem that the connection between the petitioner and Czechoslovakia in the leading case was more substantial in many ways than was Mrs. Mather's with Pennsylvania.<sup>3</sup> The former was a Czech national who had lived in Czechoslovakia literally all her life, she had married another Czech national in Czechoslovakia, she had had a matrimonial home there, and she had been deserted there. The latter was (presumably) a United States citizen (although the extent to which this nationality connected her specifically with Pennsylvania is not clear), she had lived in Pennsylvania most of her life, but she had returned only the year before the divorce after apparently at least three years' absence, she had married an Englishman in Italy, there is no mention of there having been a matrimonial home in Pennsylvania, nor does any matrimonial offence appear to have been committed in that State.

It is not suggested that the *Indyka* principle should not extend to fact situations in which the connection was less real and less substantial than it was in *Indyka v. Indyka* itself. However, extension cannot be unlimited, and it is seemly to realize that it is taking place. Decisions such as those in *Angelo v. Angelo* and *Mather v. Mahoney* may represent the limit of even the new post *Indyka* law.

### *Bastardy jurisdiction*

Case No. 7. The Court of Appeal in *R. v. Bow Road Justices, Ex parte Adedigba*<sup>4</sup> has put the English law relating to bastardy jurisdiction on to a more rational and humane basis: this has involved the overruling of much old case law. The Affiliation Proceedings Act 1957, provides in section 1:

A single woman who is with child, or has been delivered of an illegitimate child, may apply by complaint to a justice of the peace for a summons to be served on the man alleged by her to be the father of the child.

The Court of Appeal held this to be applicable although the child was born abroad at a time when the mother was domiciled and resident abroad, because at the time of the proceedings the mother and alleged father were both in England together with the children. The old case of *R. v. Blane*,<sup>5</sup> and those of *O'Dea v. Tetau*<sup>6</sup> and *R. v. Wilson, Ex parte Pereira*,<sup>7</sup> in which it was followed, were all overruled. These cases were decided on the interpretation of statutes<sup>8</sup> in very much the same terms as the Affiliation Proceedings Act. Since 1849 when *R. v. Blane* was decided there has been a great deal of

<sup>1</sup> [1968] 1 W.L.R. 1773, 1774.

<sup>3</sup> Or Mrs. Angelo's with Germany.

<sup>5</sup> (1849), 13 Q.B. 769.

<sup>7</sup> [1953] 1 Q.B. 59.

<sup>8</sup> In the case of *R. v. Blane* itself, the Poor Law Amendment Act 1844, ss. 1 and 2.

<sup>2</sup> *Ibid.*, p. 1775.

<sup>4</sup> [1968] 2 Q.B. 572.

<sup>6</sup> [1951] 1 K.B. 184.

legislation concerning bastardy, and yet Parliament has never taken the opportunity to reverse or modify the decision. There is clearly a sense in which *R. v. Bow Road Justices, Ex parte Abedigba* is a bold decision which makes new law.<sup>1</sup> It would seem, with respect, to be equally clear that it makes good law. The domicile and/or residence of the mother at the time of the child's birth would seem to be irrelevant to the policy of this legislation: so, too, the circumstance that the child was born abroad. As Salmon L.J. said, 'A bastard born abroad living with his mother in this country is just as likely as a bastard born here to be thrown on public funds if it is not supported. Any woman resident in this country is entitled to the protection of our law.'<sup>2</sup>

*Contract: the parties' choice of forum and choice of law*

*Case No. 8.* The recent Court of Appeal case of *Tzortzis v. Monark Line A/B*<sup>3</sup> is concerned with the effect of an arbitration clause indicating choice of *forum* upon the determination of the proper law of a contract. The contract in question had been made in Sweden between Swedish sellers and Greek buyers for the sale of a ship. It was to be performed both as to payment and as to delivery in Sweden. The memorandum of agreement was in the standard form in use in Scandinavia. There was no doubt that it was with Sweden that the contract had its most real and substantial connection. Assessed by objective criteria the proper law would, therefore, have been Swedish law. However, an arbitration clause in the memorandum of agreement provided that any dispute arising out of the contract should be decided 'by arbitration in the city of London'. A dispute arose and arbitrators were duly appointed. The Court of Appeal, affirming Donaldson J., held that the arbitrators should apply English law as the proper law.

As a decision *Tzortzis v. Monark Line A/B* does not make new law. Even those who subscribe to the 'objectivist' view of the determination of the proper law of an ordinary commercial contract are forced by the authorities to concede that an express choice of an arbitration tribunal will usually imply determination of the proper law. Dr. Cheshire, whom Lord Denning M.R. quotes, writes: 'For better or for worse English law is committed to the view that *qui elegit judicem elegit jus*. An express choice of a tribunal is an implied choice of the proper law.'<sup>4</sup> It is, however, to be noted, as Dr. Cheshire later points out, that: 'The danger here is a tendency to attribute too wide an operation to the maxim *qui elegit judicem elegit jus*. It must be restricted to questions other than one concerned with the existence of a valid obligation.'<sup>5</sup> This is a crucial limitation. In *Tzortzis v. Monark Line A/B* the dispute was not as to the existence of the obligation.

What is more noteworthy than the actual decision in the *Tzortzis* case is the possible width of some of the dicta let fall by the Master of the Rolls and by Salmon L.J. Lord Denning said: 'It is quite clear that, if there is an express clause in a contract providing what the proper law is to be, that is conclusive in the absence of some public policy to the contrary.'<sup>6</sup> If 'public policy' is construed in the normal sense in which it qualifies the applicability of any rule of law, this could appear to be an unequivocal statement of the subjectivist position. Salmon L.J. said: 'The law by which the contract is to be governed depends upon the intention of the parties. When that intention

<sup>1</sup> For criticism of the old law see the present writer, *International and Comparative Law Quarterly*, 2 (1953), p. 398 and this *Year Book*, 39 (1963), p. 479.

<sup>2</sup> [1968] 2 Q.B. 572, 581.

<sup>3</sup> [1968] 1 W.L.R. 406.

<sup>4</sup> Cheshire, *Private International Law* (7th ed., 1965), p. 193 (cited by Lord Denning M.R., [1968] 1 W.L.R. 412).

<sup>5</sup> *Ibid.*, at p. 196.

<sup>6</sup> [1968] 1 W.L.R. 411.



is expressed in the contract, rarely does any difficulty arise.'<sup>1</sup> Although the learned Lord Justice speaks of 'the' contract, some may infer that he had in mind commercial contracts generally.

It is respectfully submitted, however, that these dicta must be seen in perspective and construed in the context of the case in which they were uttered. *Tzortzis v. Monark Line A/B* was concerned with the identification of the applicable law in a specialized situation—the situation produced by the existence of an arbitration clause unambiguously specifying a particular *forum* and pursuant to which arbitration was taking place for the resolution of disputes being disputes otherwise than as to the existence of the obligation. It is unlikely that isolated dicta uttered in such a context (and in a case which, being reported in Volume 1 of the Weekly Law Reports, is impliedly not regarded as sufficiently important to report in the *Law Reports*) has set at rest a major issue in the English private international law of contract, namely, the question of the extent to which we will recognize the autonomy of the parties in the determination of the proper law generally.

P. B. CARTER

<sup>1</sup> [1968] 1 W.L.R. 406, 412.

## DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES DURING 1968\*

### *Community officials—privileges and immunities*

*Case No. 1. Van Leeuwen v. City of Rotterdam.*<sup>1</sup> The *Van Leeuwen* case, referred to the Court of Justice of the European Communities by the Court of Appeal at The Hague under Article 177 of the E.E.C. Treaty, deals with the immunity from income-tax enjoyed by officials of the Communities, and the principles which the case lays down can be applied not only to the officials of other international organizations, but to diplomatic agents as well.

The plaintiff, an official of the E.E.C., sent his daughter to a publicly financed school in Rotterdam, where he had lived before going to work for the Community in Brussels. Under Dutch law, fees were charged by local authorities in the case of children who (like the plaintiff's daughter) remained at school after the minimum school-leaving age. The fees varied from 8 to 200 florins *per child per annum*, according to the amount of income-tax and wealth tax payable by the parents; the higher the amount of tax payable, the higher the fees. If the parents were not resident in Holland or were wholly or partly exempt from paying income-tax and wealth tax under Dutch law, they were obliged to pay the maximum rate of 200 florins, unless they could prove that they would have had to pay a lesser sum if they had been resident in Holland and subject to Dutch income-tax and wealth tax, in which case they were only obliged to pay the lesser sum.

The plaintiff was required to pay fees of 200 florins, which were later reduced to 120 florins. He appealed to the Court of Appeal at The Hague, arguing that Article 12 of the Protocol on the privileges and immunities of the E.E.C. exempted officials of the Community from paying income-tax on their salaries, and that therefore no account should be taken of his official salary in calculating taxes payable by him to the Dutch authorities. The real question was whether the school fees could be regarded as a tax on salary, within the meaning of Article 12 of the Protocol; and the Dutch Court requested an answer to this problem from the Court of Justice of the European Communities.

The Court of Justice of the European Communities gave short shrift to the plaintiff's claim.<sup>2</sup> It said that a distinction must be made in Community law, as in national law, between *taxes*, which were levied to meet the general needs of the authorities, and *charges*, which were payable in return for specific services. It pointed out that Article 3 of the Protocol exempted the Community from all direct taxes, but not from taxes or charges which simply represented payment for public utility services.<sup>3</sup> The Court saw nothing in the spirit or the letter of Article 12 which could be interpreted as granting exemption from charges payable in return for specific services, even if those charges were scaled according to an individual's income; such a method of

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<sup>1</sup> *Recueil de la jurisprudence*, 14 (1968), p. 63.

<sup>2</sup> *Ibid.*, at pp. 71-2.

<sup>3</sup> The same is true of most international organizations: C. W. Jenks, *International Immunities* (1961), p. 59. The Advocate-General Roemer pointed out (*Recueil de la jurisprudence*, 14 (1968), p. 63 at p. 76) that diplomats are not exempt from 'charges levied for specific services rendered' (Vienna Convention, 1961, Art. 34 (e)). The rule is the same for consuls (Vienna Convention, 1963, Art. 49 (e)).

calculating charges was common in the welfare legislation of different countries, but the charges still remained charges for specific services and were not transformed into taxes. The question of incompatibility with Article 12 of the Protocol would only arise if the amount payable by an official went beyond reasonable payment for the service rendered *to him personally*;<sup>1</sup> in other words, it was doubtful whether wealthy officials could be called upon to subsidize poorer users of the service. Subject to this proviso, the Court considered that the Dutch school fees did not constitute a tax within the meaning of Article 12.

The plaintiff had based his case largely on *Humblet v. Belgian State*, in which the Court had held that it was illegal to take an official's salary into account when assessing the rate at which he should pay income-tax on his income from sources other than the Community (investments, wife's income, etc.).<sup>2</sup> But the answer to this argument lies once more in the difference between taxes and charges; as the Advocate-General Roemer put it, there is a difference between taking an official's salary into account, in order to determine the rate of *tax* payable on his other income, and taking his salary into account, in order to determine the rate at which he should pay *charges* such as school fees. The plaintiff's argument, if accepted, would have produced unreasonable results, enabling officials to claim a vast range of welfare benefits, including legal aid, without submitting to a means test.<sup>3</sup>

The Court's opinion contains a curious passage,<sup>4</sup> in which it said that Article 12 (2) of the Protocol, providing for exemption from national income-tax, cannot be considered in isolation from Article 12 (1), which obliges the Community to levy taxes of its own on officials' salaries, and that exemption from national income-tax is a *consequence* of the Community's own system of taxation, in order to prevent double taxation, and in order to prevent officials' net pay varying as a result of differences between national rates of tax. Seen in this context, said the Court, Article 12 (2), like Article 12 (1), covered national taxes on salary, whatever their official nomenclature or the form in which they were levied.

By using literal methods of interpretation, the Court gave an entirely misleading impression of the history and *raison d'être* of international officials' immunity from national income-tax. It is true that one reason for this immunity is the desire to prevent the inequality among officials which would result from the application of varying rates of national tax to uniform gross salaries; another reason, which the Court did not mention, is the desire to prevent the inequality among member States which would result if the host State were able to levy taxes on salaries which were paid out of contributions from *all* the member States. But it is untrue to say that immunity from national tax is the consequence of an organization's own staff assessment plan (to use the United

<sup>1</sup> Here again one may see a similarity in Article 3 of the Protocol, which provides that the Community shall not be exempt from taxes, charges and duties 'qui ne constituent *que la simple rémunération de services d'utilité générale*' (italics added). A similar implication emerges from most of the provisions cited by Jenks, *op. cit.*, p. 59. The point is made most clearly in Section 7 of the General Convention on the Privileges and Immunities of the United Nations, and in Section 9 of the General Convention on the Privileges and Immunities of the Specialized Agencies, which speak of 'taxes which are, in fact, *no more than charges for public utility services*' ('impôts qui ne seraient pas *en excès de la simple rémunération de services d'utilité publique*') (italics added).

<sup>2</sup> *Recueil de la jurisprudence*, 6 (1960), p. 1125. The *Humblet* case, like the present case, involved the subjection of an official's salary to a *fictional* taxation in order to determine the rate at which he should make other payments which did not constitute a direct tax on his salary.

<sup>3</sup> *Ibid.*, 14 (1968), at p. 79. Such results would have placed an unfair burden on the host state and on other users of the welfare services in question (p. 77).

<sup>4</sup> *Ibid.*, 14 (1968), p. 71.



Nations terminology) and of the resulting need to avoid double taxation; such immunity existed years before anyone had thought of staff assessment schemes. It has been normal to exempt the salaries of international officials from national income-tax since the foundation of the League of Nations, if not earlier, but the first staff assessment plan was not adopted until 1948 (by the United Nations), if one excludes a voluntary scheme operated by the I.L.O. with the consent of its staff during the Second World War.<sup>1</sup> The original purpose of the United Nations staff assessment plan was to overcome the difficulties caused by the refusal of the United States to ratify the General Convention on the Privileges and Immunities of the United Nations, which provided for officials' salaries to be immune from national income-tax. Since then, staff assessment plans have acquired a second purpose—to prevent taxpayers becoming jealous at the sight of international officials not paying any income-tax at all; it was probably for this reason that the drafters of the E.E.C. Protocol insisted on having such a plan. But, whatever the reasons for adopting a staff assessment plan, the fact remains that such plans, and the resulting problems of double taxation, are the logical and historical consequence of exempting officials' salaries from national income-tax, and not vice versa, as the Court of Justice of the European Communities suggested.

There is another curious thing about the Court's remarks on the connection between Article 12 (1) and Article 12 (2), namely, that there seems to be no thread linking them with the rest of the Court's judgment.<sup>2</sup> But some connection between the two lines of thought becomes apparent if one examines the submissions of the Advocate-General Roemer.<sup>3</sup> He, too, mentioned the staff assessment plan and the problem of double taxation, and argued that there would be no danger of officials incurring double taxation if they were forced to pay school fees to member States, since the Community obviously did not make a charge for officials' children attending State schools; on the contrary, it paid education allowances to its officials, to help them meet the cost of school fees! He also said that the Community had an *interest* in preventing the net salaries of its staff from varying as a result of being subject to different rates of national tax (presumably because such variations would tend to produce jealousy and discontent among the staff, which would adversely affect their *rendement*), but that it had no similar *interest* in ensuring that its officials were exempt from paying school fees, which differed from income-tax in that they were payable, not because the taxpayer received a salary, but because he chose to send his child to a fee-paying school. And Article 17 of the Protocol provided that privileges and immunities were granted to officials in the exclusive *interests* of the Community.

Finally, it should be noted that certain passages in the judgment, and in the submissions of the Advocate-General, attach importance to the fact that the plaintiff was not obliged to keep his daughter at school after the minimum school-leaving age. Would the position have been different if Dutch law had required the plaintiff to send his daughter to a school run by a local authority, and to pay fees for her education? The answer cannot be predicted with certainty, but most, at any rate, of the arguments used by the Court and by the Advocate-General would apply with equal force in such a situation. Similarly, the reasoning used by the Court (apart from the references to the

<sup>1</sup> Even in the European Communities immunity preceded staff assessment; the E.C.S.C. Protocol of 1952 provided for immunity, but not for staff assessment, and the same was true of the E.C.S.C. Staff Regulations for many years.

<sup>2</sup> For instance, they seem to be leading up to an extensive interpretation of the word 'tax', while the rest of the judgment places a restrictive interpretation on the word. Maybe the two parts of the judgment are meant to balance each other—the word should not be interpreted too extensively nor too restrictively.

<sup>3</sup> *Recueil de la jurisprudence*, 14 (1968), at p. 77.

staff assessment plan and double taxation) would be equally relevant for other international organizations, and indeed for diplomatic agents also.

*Restrictive practices—patents*

*Case No. 2. Parke, Davis and Co. v. Probel and others.*<sup>1</sup> The case of *Parke, Davis and Co.*, another of those referred to the Court of Justice of the European Communities by the Court of Appeal at The Hague under Article 177 of the E.E.C. Treaty, provided the Court with its first opportunity to discuss the relationship between patents and the E.E.C. rules on competition.

The plaintiff, an American company, held two Dutch patents for the manufacture of the antibiotic drug chloramphenicol. It granted licences for the exploitation of these patents to a Dutch company and undertook to take legal action to prevent any infringements of the patents in Holland.<sup>2</sup> In pursuance of this undertaking, the plaintiff began proceedings in 1958 against the defendants, who had imported chloramphenicol into Holland without the consent of the plaintiff company or of its Dutch licensee. After prolonged litigation, the Court of Appeal at The Hague found for the plaintiff, but postponed judgment on the question of chloramphenicol imported from Italy, the only member State where its manufacture was not patented. Under Italian law, neither drugs nor their method of manufacture could be patented, and the defendants argued that they ought to be allowed to import chloramphenicol from Italy to Holland, on the grounds that the principles of free movement of goods and free competition laid down in the E.E.C. Treaty overrode the Dutch law on patents. The Court of Appeal therefore sought the views of the Court of Justice of the European Communities on the following questions:

1. Les pratiques interdites et abusives visées aux articles 85, paragraphe 1, et 86 du traité instituant la Communauté économique européenne, éventuellement considérés en liaison avec les dispositions des articles 36 et 222 de ce traité, concernent-elles ou non le titulaire d'un brevet délivré par les autorités d'un État membre, lorsqu'en vertu de ce brevet il demande à l'autorité judiciaire d'empêcher sur le territoire de cet État toute circulation, vente, location, délivrance, stockage ou utilisation d'un produit quelconque provenant d'un autre État membre si celui-ci n'accorde pas un droit exclusif pour fabriquer ou vendre ce produit?

2. La réponse à la question 1 est-elle différente si le prix auquel l'ayant droit met le produit dans le commerce sur le territoire du premier État membre est supérieur à celui qui est demandé, sur ce même territoire, à l'utilisateur pour le produit lorsqu'il provient du second État membre?

In view of the importance of the questions raised, statements were submitted to the Court of Justice of the European Communities, not only by the parties to the Dutch litigation, but also by the Commission of the European Communities and by the Governments of Holland, Germany and France.

The Court began by pointing out that the national rules on patents had not yet been unified in the Community, and that therefore differences between the national rules were capable of impeding the free movement of goods and the free play of competition. The Court seemed to think that such impediments were inevitable and not necessarily contrary to the E.E.C. Treaty.

<sup>1</sup> *Recueil de la jurisprudence*, 14 (1968), p. 81.

<sup>2</sup> Strictly speaking, only the method of manufacturing a drug can be patented in Holland, and not the drug itself. However, in an action for infringing a patent, drugs marketed without the patent-holder's consent are presumed to have been manufactured by the patented process, unless the defendant can prove otherwise.



Article 85 of the E.E.C. Treaty forbids 'all agreements between undertakings, all decisions by groups of undertakings, and all concerted practices', which are capable of affecting trade between member States and whose purpose or effect is to prevent, restrict or distort competition. The agreements, decisions and practices contemplated by Article 85 implied an element of contract or co-operation between undertakings, said the Court, and therefore could not cover a patent, which consisted of rights granted by the State to one party only.<sup>1</sup> However, the Court did leave open the possibility of applying Article 85 'si l'utilisation d'un ou plusieurs brevets, *concertée entre entreprises*, devait aboutir à créer une situation susceptible de tomber sous les notions d'accords entre entreprises, décisions d'associations d'entreprises ou pratiques concertées . . .' (italics added).

Article 86 of the Treaty forbids 'any abusive exploitation by one or more undertakings of a dominant position in the Common Market or in a substantial part of it, in so far as trade between member States could be affected thereby'. All three requirements—dominant position, abusive exploitation and possibility of affecting trade between member States—had to be fulfilled before Article 86 applied, said the Court. Patents gave their holders a special protection in the State concerned, but the exercise of rights under a patent was not caught by Article 86 unless it amounted to an abusive exploitation.<sup>2</sup> The Court found an analogy in Article 36 of the Treaty, which states *inter alia* that measures to protect patents may override the rules on free movement of goods contained in Articles 30–4, provided that such measures must not constitute a means of arbitrary discrimination or a disguised restriction in trade between member States. Consequently, said the Court, the *existence* of a patent was governed by national law, and only its *use* could be subject to Community law.

For these reasons, the Court gave the following answers to the first question:

1. Les droits accordés par un État membre au titulaire d'un brevet d'invention ne sont pas affectés dans leur existence par les interdictions des articles 85, paragraphe 1, et 86 du traité.

2. L'exercice de ces droits ne saurait lui-même relever ni de l'article 85, paragraphe 1, en l'absence de tout accord, décision ou pratique concertée visés par cette disposition, ni de l'article 86, en l'absence de toute exploitation abusive de position dominante.<sup>3</sup>

One striking feature of the Court's judgment is the omission of all reference to Article 222 of the Treaty, despite the fact that it was mentioned in the question put to the Court. Advocate-General Roemer built quite an elaborate argument on Article 222, which provides: 'Le présent traité ne préjuge en rien le régime de la propriété dans les États membres.' He thought that it would be incompatible with Article 222 to allow imports of drugs from Italy to Holland against the wishes of the holder of the

<sup>1</sup> *Recueil de la jurisprudence*, 14 (1968), p. 81, at p. 110. Cf. Advocate-General Roemer at p. 117: 'Nous avons affaire à une action unilatérale du titulaire de droits de brevets . . . Même s'il est tenu vis-à-vis du bénéficiaire néerlandais de la licence d'exercer ses droits [by suing the defendants], ce n'est toutefois pas ledit accord qui est susceptible de provoquer une restriction de la concurrence, mais seulement le droit (subjectif) de brevet national.'

<sup>2</sup> *Ibid.*, at p. 110. Examples of abusive exploitation are given in Article 86 itself: they include the imposition of inequitable prices. Of course, if the patent does not give its holder a dominant position, no question of abusive exploitation can arise. Advocate-General Roemer suggested that in many circumstances a patent might not give its holder a dominant position on the market—for instance, if the patent was not commercially exploitable, if there were several licensees competing with one another, if there was another method of manufacturing the patented product (in the case of drugs under Dutch law), or if similar products (e.g. other antibiotics) competed with the patented product (*ibid.*, pp. 119–20).

<sup>3</sup> *Ibid.*, p. 112.



Dutch patent, because otherwise the patent (a form of property) would be 'vidé de sa substance'; competitors would always be able to buy more cheaply from Italian manufacturers of drugs, who would be able to use other people's inventions without contributing to their research costs, and manufacturers in other countries would lose all incentive for further research, in the absence of any chance of recovering their research costs from a monopoly on sales.<sup>1</sup>

One cannot tell why the Court did not refer to Article 222; one reason may possibly have been uncertainty over its scope. Apart from safeguarding the right of States to nationalize and denationalize property,<sup>2</sup> the effect of Article 222 is far from clear. The Court had said in the *Grundig* case<sup>3</sup> that Article 222 prevented Community law from interfering with title to property, but not from interfering with the exercise of the rights of ownership, when such interference was authorized by another provision of the treaty. The distinction between title and the exercise of the rights of ownership is not clear-cut, and the present case was very much a border-line case; can the Court be blamed for deciding the case on uncontroversial grounds rather than on controversial ones?

In reply to the second question put by the Dutch Court of Appeal, the Court gave an answer which must approach the record for brevity:

sans exclure que le prix de vente du produit protégé puisse être retenu comme élément d'appréciation d'une éventuelle exploitation abusive, la supériorité du prix du produit breveté par rapport à celui du produit non breveté n'est pas nécessairement constitutive d'abuse.<sup>4</sup>

Advocate-General Roemer explained that it was natural for the price of a patented drug to be appreciably higher than the price of a drug produced by a 'pirate' manufacturer, since the patent-holder had to bear the costs of research and of launching the drug on the market. However, even if the price were 'inequitable' within the meaning of Article 86 of the Treaty, this would not entitle other people to import consignments of the drug which had been manufactured in a member State where it could not be patented. Such imports would deprive the patent-holder of his dominant position on the market; but the Treaty did not prohibit dominant positions as such, only their abusive exploitation. The correct remedy for abusive exploitation lay in Article 3 of Regulation 17, which empowered the Commission to order undertakings, under the threat of a fine, to put an end to infringements of Articles 85 and 86 of the Treaty.<sup>5</sup>

There is also another possibility, namely that imports might be allowed from another member State where the product or its mode of manufacture had been patented, provided that the quantities imported had been originally sold in the other member State by the patent-holder or with his consent. This would protect the interests of the patent-holder, while preventing his licensees from making exorbitant profits (although of course it would not prevent them from being made by the patent-holder himself).

<sup>1</sup> *Recueil de la jurisprudence* 14 (1968), pp. 118-19. It is submitted that such a position would itself constitute a breach of Article 86. Italian manufacturers would soon acquire a dominant position, since they alone would be able to evade contributing to inventors' research costs: and the limitation of technical development is mentioned in Article 86 itself as an example of abusive exploitation of a dominant position.

<sup>2</sup> Although even this right is subject to conditions of non-discrimination, as shown by the *Costa* case, (ibid., 10 (1964), p. 1141.

<sup>3</sup> Ibid., 12 (1966), p. 429, at p. 500.

<sup>4</sup> Ibid., 14 (1968), pp. 110-11.

<sup>5</sup> Ibid., at pp. 121-3. Characteristically, the French Government also emphasized the powers given to member States to enforce Articles 85 and 86 until the Commission had decided to act (p. 101).

As far as trade marks are concerned, it is clear from the *Grundig* case that the Court is prepared to allow such 'parallel imports' to override sole distributorship agreements, subject to certain conditions,<sup>1</sup> but it is not certain whether the same rule applies to licences for the exploitation of patents; in the *Parke, Davis* case the Court was concerned only with imports from member States where the product or process could not be patented, not with imports from member States where it was patented.

*Works of art—export duties and taxes having an equivalent effect*

*Case No. 3. Commission of the European Communities v. Italian Republic.*<sup>2</sup> In 1939 Italy passed a law to restrict the export of objects possessing an artistic, historical, archaeological, or ethnographic value. If the object was particularly important, its exportation was banned. In other cases, the exporter had to declare the financial value of the object and apply for an export licence, which was granted upon payment of a tax varying, according to the declared value, from 8 per cent to 30 per cent of the declared value; the top rate of 30 per cent was payable on items worth 500,000 lire or more. The Italian State also had an option to purchase the object at its declared value. With the fall in the value of the lira and the rise in art prices, virtually all works of art became subject to tax at the top rate of 30 per cent.

In 1960 the E.E.C. Commission asked Italy to amend the law of 1939. It raised no objection to prohibitions on exports or to the right of pre-emption, but it considered that Italy was obliged by Article 16 of the E.E.C. Treaty to remove all taxes on exports to other member States by the end of the first stage of the transitional period, i.e. before 1 January 1962. (Nothing was said about exports to non-member States, but, once goods had been exported free of tax from Italy to another member State, it would presumably be difficult to prevent them being re-exported tax-free to a non-member State.) After prolonged correspondence, the Commission threatened in 1964 to sue Italy in the Court of Justice of the European Communities. However, the Commission postponed action in order to give Italy more time to alter the law of 1939, and a bill to reform that law was introduced in the Italian Parliament. In March 1968 the Italian Parliament was dissolved without adopting the bill, and the Commission instituted proceedings in the Court of Justice just before the dissolution. The Court gave judgment on 17 December 1968.

Italy expressed doubts about the admissibility of the proceedings, on the grounds that the Commission should have waited until a new Parliament had had an opportunity to reform the law of 1939. The Court brushed aside these doubts, holding that the Commission was free to choose the time for instituting proceedings; besides, the Commission had already given Italy ample time to reform the law of 1939.

On the merits, Italy argued that the objects covered by the law of 1939 were not subject to the E.E.C. Treaty at all; Article 9 of the Treaty provided that the customs union instituted by the Treaty should apply 'à l'ensemble des échanges de marchandises', and the objects covered by the law of 1939 differed so much from other goods that they did not constitute *marchandises* within the meaning of Article 9. Rejecting this argument, the Court defined *marchandises* as 'produits appréciables en argent et susceptibles, comme tels, de former l'objet de transactions commerciales', and the objects covered by the Italian law fell within this definition, however much they might differ from other goods; indeed, the Italian law itself, by imposing an *ad valorem* tax on such objects, recognized that they were 'appréciables en argent'.

<sup>1</sup> *Recueil de la jurisprudence*, 12 (1966), p. 429.

<sup>2</sup> *Ibid.*, 14 (1968), p. 617.

Article 16 of the E.E.C. Treaty provides :

Les États membres suppriment entre eux, au plus tard à la fin de la première étape [of the transitional period], les droits de douane à l'exportation et les taxes d'effet équivalent.

The Commission's case was that the Italian tax was a 'taxe d'effet équivalent'. Italy denied this, arguing that the purpose of the tax was not to raise revenue, but to safeguard the Italian national heritage; indeed, the revenue raised by the tax was insignificant. The Court held that the *purpose* of the tax was irrelevant; what mattered was its *effect*, and the Italian tax was contrary to Article 16 because its effect was the same as that of an export duty, viz., to hamper the export of goods by raising their price.

Finally, the Court rejected an Italian argument based on Article 36 of the Treaty, which provides :

Les dispositions des articles 30 à 34 inclus ne font pas obstacle aux interdictions ou restrictions . . . d'exportation . . ., justifiées par des raisons de . . . protection des trésors nationaux ayant une valeur artistique, historique ou archéologique. . . .

However, Articles 30-4 are not concerned with taxes, but with quantitative restrictions such as quotas; like Article 36 itself, they appear in a chapter of the Treaty entitled 'L'élimination des restrictions quantitatives entre les États membres.' The Court therefore had no difficulty in holding that Article 36 had nothing to do with taxes;<sup>1</sup> the effect of taxes such as those imposed by the Italian law was entirely different from the effect of the prohibitions and restrictions mentioned in Article 36—their effect was to decrease the *profitability* of exports, not to *oblige* people to abstain from exporting. The free movement of goods was one of the basic principles of the Treaty, and exceptions to that principle had to be construed restrictively.

Italy argued that Article 36 would have entitled her to prohibit the export of works of art altogether;<sup>2</sup> why, then, should she not be allowed to impose taxes in order to make exports *more difficult*—a step which would have interfered less with free movement of goods than a total prohibition of exports? The Court dealt with this argument by holding that the purpose of Article 36 was to preserve the national artistic heritage; by merely making exports more difficult, but not impossible, the Italian tax did not achieve that purpose; consequently it was perfectly natural that Article 36 should authorize quantitative restrictions but not export duties and similar taxes.

For these reasons, the Court declared that Italy was in breach of Article 16 of the E.E.C. Treaty by continuing to collect the tax provided for in the law of 1939.

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<sup>1</sup> Italy argued that her law did in fact impose a quantitative restriction. Advocate-General Gand said (*Recueil de la jurisprudence*, 14 (1968), pp. 633-4): 'Il nous semble ici qu'il y a un véritable abus de mot, car la mesure incriminée ne comporte la fixation d'aucun contingent, ce qui est le cas normalement quand on parle de restrictions quantitatives, mais simplement la délivrance d'une licence accordée sur demande. Au surplus, une restriction quantitative ne pourrait s'accompagner du paiement d'une taxe sans déborder par cela même du cadre de l'article 36.'

<sup>2</sup> It may be that this is exactly what Italy will ultimately do, as a consequence of the case.



# BRITISH LEGISLATION DURING 1968 INVOLVING QUESTIONS OF PUBLIC INTERNATIONAL LAW\*

## *The Commonwealth Immigrants Act, 1968*

The Commonwealth Immigrants Act of 1968, which was enacted in February of that year, was as controversial a piece of legislation as any since the original Act of 1962.

Several provisions in the Act deal with immigration to the United Kingdom from the Commonwealth generally, but the passage of the Act was really caused by the situation which, H.M. Government believed, had begun to develop in East Africa and in particular in Kenya, whereby perhaps 200,000<sup>1</sup> persons of Asian origin living in the former British Colonies and Protectorates and possessing citizenship of the United Kingdom and Colonies might seek to remove themselves to the United Kingdom. The solution to this problem was found in legislation which enacted the principle that persons of United Kingdom citizenship whose sole 'British' connection is the possession of a passport issued by or on behalf of H.M. Government in the United Kingdom might be subjected to immigration control and might be refused entry even though they have no other nationality whatever, and no connection at all with any independent member State of the Commonwealth or any other United Kingdom dependency.

One of the two main purposes of the Commonwealth Immigrants Act, 1962, was, of course, to control immigration from the Commonwealth into the United Kingdom. In this regard, the provisions of the Act were applied to all Commonwealth citizens except those defined in s. 1 (2). These are (a) persons born in the United Kingdom, (b) persons who hold a United Kingdom passport and are citizens of the United Kingdom and Colonies, or who hold such a passport issued in the United Kingdom, and (c) persons whose names appear on such passport, that is, the family of the passport holder. Thus all British subjects who are not citizens of the United Kingdom and Colonies are subject to control and are liable to exclusion from this country. But the Act went further and also subjected to its provisions citizens of the United Kingdom and Colonies who do not 'belong' to the United Kingdom itself. This is because of the definition of a 'United Kingdom passport' in s. 1 (3) of the Act, which states that the term means a passport issued to the holder by the Government of the United Kingdom, not being a passport so issued on behalf of the Government of any part of the Commonwealth outside the United Kingdom. Further, representatives of the United Kingdom Government in Colonies which have some degree of self-government are instructed, when issuing passports to citizens of the United Kingdom and Colonies who do not 'belong' to the United Kingdom but to the relevant Colony, to issue them on behalf of the local authorities and not on behalf of H.M. Government in the United Kingdom. Thus in *R. v. Secretary of State for the Home Department, Ex parte Bhursha*,<sup>2</sup> citizens of the United Kingdom and Colonies sought to enter by virtue of passports issued by the United Kingdom representatives in Mauritius; they had been issued on

\* © J. G. Collier, 1969.

<sup>1</sup> This figure is an estimate given by the Home Secretary in the House of Commons in the debate on the second reading of the debate. *Hansard*, H.C., 1967-8, vol. 759, col. 1246.

<sup>2</sup> [1968] 1 Q.B. 266 (C.A.).

behalf of the Governor of Mauritius acting for Her Majesty. The Court held that these were not United Kingdom passports within s. 1 (3) and therefore the applicants were subject to the Act and would probably be refused admission into the United Kingdom.

In 1963 Kenya became independent. One consequence was that all persons who upon or after independence became citizens of Kenya should cease to be citizens of the United Kingdom and Colonies.<sup>1</sup> Such persons would continue to be subjected to the provisions of the 1962 Act. But a person might not become a citizen of Kenya and so would remain a citizen of the United Kingdom and Colonies. If his position *vis-à-vis* the Act be considered, it appears that although he fell under its provisions until 1963 (assuming he then held a passport issued on behalf of the Kenya authorities), he would cease to do so after that, for any United Kingdom passport he might obtain in Kenya must be a United Kingdom passport within s. 1 (3).

Many persons who were citizens of the United Kingdom and Colonies resident in Kenya in 1963 did not take Kenya citizenship; they were mainly persons of Asian origin who formed the major trading class in that country. They were never very popular in Kenya, and their position there began to worsen in 1967 when the Government of Kenya began to procure legislation against their interests. Under the provisions of the Trade Licensing Act, 1967,<sup>2</sup> and the Immigration Act, 1967,<sup>3</sup> an Asian trader living in Kenya and having only United Kingdom citizenship and passport might be refused the requisite trading licence and be expelled from Kenya on the expiry of his residence permit. Should this happen, such a person would naturally turn to the United Kingdom since he had not the nationality of any other state, and the country of his ethnic origin, usually India, would not be bound to admit him and might be unwilling to do so.

The political agitation which arose at the end of 1967 in this country caused H.M. Government to move; they did not adopt the administrative course of withdrawing United Kingdom passports from the Kenya Asians, but introduced into Parliament an amending Bill which passed all its legislative stages within a week and came into operation early in March 1968.

By s. 1. of the 1968 Act, s. 1 of the 1962 Act was amended to remove certain persons from exemption from the application of the latter Act. Henceforth its provisions also apply to a citizen of the United Kingdom and Colonies holding or included in a current passport issued by the United Kingdom authorities unless the citizen or one of his parents was either

- (a) born in the United Kingdom, or
- (b) is or was naturalized in the United Kingdom, or
- (c) became a citizen of the United Kingdom through adoption there, or
- (d) became a citizen by registration in the United Kingdom or in a specified Commonwealth country.<sup>4</sup>

There is, however, no automatic refusal of admission to the United Kingdom; instead, the Government proposed a quota system which, though 'flexible' would permit 1,500 entry vouchers a year for heads of families to be issued by United Kingdom

<sup>1</sup> Kenya Independence Act, 1963, s. 2 (2). Certain persons were deemed to retain citizenship of the United Kingdom and Colonies, even though they acquired citizenship (s. 3). These are not relevant here.

<sup>2</sup> Especially ss. 3, 5.

<sup>3</sup> Especially s. 4 (2).

<sup>4</sup> Section 1 which inserts an additional subsection 2 (A) into s. 1 of the Act of 1962.

High Commissioners in the territories concerned to applicants on the basis of their personal circumstances, their legal status and the law of the relevant territory.<sup>1</sup>

The effect of this is to add to the category of persons not exempt from control individuals who have no other country to go to if they are expelled by another State. Once the quota for a year is exhausted, what is to happen to such people who arrive in this country later? If the Kenya Government were to expel 5,000 Asians, what is to happen to the 3,500 who would not get entry vouchers if the quota were to be strictly adhered to? This brings us to the position of the Act and H.M. Government, in the light of international law.

Attacks were made upon the Bill from the point of view of the international jurist, and passages from Oppenheim's *International Law* were read in the House of Commons. One commentator put the argument by saying that the Act 'authorises the violation of the duty imposed on the United Kingdom by international law to admit its own citizens'.<sup>2</sup> This does not appear to be entirely accurate, for, although it is true that the Act does appear to authorize the violation of international law, this could only happen in a rather more indirect way. What is meant by saying that there is a duty imposed upon States to admit their own nationals?

Sometimes text-writers state the existence of such a duty in peremptory terms. Panhuys for example, says that 'the duty to admit nationals is considered so important a consequence of nationality that it is almost equated with it'.<sup>3</sup> There is some State practice to support the existence of this duty,<sup>4</sup> and occasionally provisions of treaties require the State of nationality to admit its individuals.<sup>5</sup> Thus, Article 12 of the United Nations International Convention on Civil and Political Rights, adopted in December 1966 provides that 'no one shall be absolutely deprived of the right to enter his own country'.<sup>6</sup>

Nevertheless it is clear that if *X*, a citizen of the United Kingdom, arrives, say, at London Airport and is refused admission, no breach of international law is committed at that point. Treaty provisions apart, a State does not owe duties at international law to its own nationals, and there exists no other State which has the requisite *locus standi* to complain of any breach. The only example of redress being given by treaty which could affect the issue is in Article 3 (2) of Protocol IV to the European Convention for the Protection of Human Rights and Fundamental Freedoms which states that 'no one shall be deprived of the right to enter the state of which he is a national'. Unfortunately for *X*, in the example, the United Kingdom has prudently refrained from ratifying this Protocol.

In fact, the text-writers already adverted to are at pains to emphasize that the duty to admit nationals is not owed to the individual, but to other states. Weiss, for example, remarks that 'as between a national and the State of nationality the question of the right of sojourn is not a question of international law'.<sup>7</sup> The duty exists only towards

<sup>1</sup> See *Hansard*, H.C., 1967-8, vol. 759, cols. 1255, 1440.

<sup>2</sup> B. A. Hepple, *Modern Law Review*, 31 (1968), p. 423.

<sup>3</sup> *The Role of Nationality in International Law* (1959), p. 56; see also Weiss, *Nationality and Statelessness in International Law* (1956), p. 49 and Oppenheim, *International Law*, vol. i, p. 646.

<sup>4</sup> For one example see Hackworth, *Digest of International Law*, vol. 3, p. 740.

<sup>5</sup> See the Havana Convention on the Status of Aliens, *United States Treaty Series*, 4 (1925), p. 4722.

<sup>6</sup> See *American Journal of International Law*, 61 (1967), p. 870.

<sup>7</sup> *Op. cit.* in n. 3 on this page. He states that the right of entry is given to the individual by municipal law and refers to Art. 111 of the 1919 Constitution of the Weimar Republic. He also mentions the decision of the Court of Appeal of British Columbia in *R. v. Soon Gin An* (1941), 3 D.L.R. 125. See also Panhuys, *op. cit.*, and Oppenheim, *op. cit.* (both cited in n. 3 on this page).



foreign States and thus can only be breached when the interests of a foreign State are involved. Such breach would take place when, as a result of the refusal to admit an individual the State which seeks to expel him is effectively precluded from doing so, or where he is deposited upon the territory of a State of which he is not a national, against that State's will. This could occur within the context of the Commonwealth Immigrants Act, 1968. The supplementary provisions in the First Schedule to the 1962 Act, which now apply to persons falling within the 1968 Act, make clear that there are only four countries to which the Secretary of State may direct the owners or agents of a ship or aircraft to remove a prohibited immigrant: (i) the country of which he is a citizen; (ii) the country of which he holds a passport; (iii) a country to which there is reason to believe he will be admitted, and (iv) the country in which he embarked for the United Kingdom. Suppose *X*, a Kenya Asian, having only citizenship of and a passport issued by the Government in the United Kingdom, arrives at London Airport, choices (i) and (ii) are not open to the Secretary of State; unless a country will take him, the only place left is (iv). But the State in which he embarked, be it Kenya, or a third State, such as France, would be under no obligation to take him. If the Secretary of State were to succeed in having him removed thither, the United Kingdom would have committed a breach of international law against that State. In this sense the Act may be said to have authorized the violation of international law.

However, it was stated that this would not be allowed to happen; during the debate on the Bill, the Home Secretary was forced to admit that the Act would have to be set aside in such a case. He said: 'I was asked what we would do about a man who was thrown out of work and ejected from the country [Kenya]. We shall have to take him. We cannot do anything else in the circumstances.'<sup>1</sup> He was at pains to point out that he was not seeking to exclude the Kenya Asians for all time or to compel them into eternal flight from Nairobi to London and back again, but rather that he was asking them to form a queue for admission into the United Kingdom.<sup>2</sup> This being the case, H.M. Government had clearly no intention of using the authority of Parliament to violate international law. But it remains somewhat disquieting that Parliament should have given the distinct impression that it was authorizing the exclusion of nationals,<sup>3</sup> when so much international treaty-making in the form of a United Nations Convention and a Protocol to the European Convention has sought to establish the right of admission to an individual's own State as a fundamental human right.

The rest of the provisions of the Act are of less direct interest, but of great importance; s. 2 confers several new discretionary powers upon immigration officers of all Commonwealth citizens who are subject to control; thus, for example, restrictive conditions of entry may now be imposed on wives and children of such citizens and a child under sixteen may be refused admission unless he satisfies an immigration officer that he is joining or accompanying both his parents.

Section 3 creates a new criminal offence which may be committed by a Commonwealth citizen who is subject to control who either has not been examined by an immigration officer while on board a ship or aircraft from which he lands in the United Kingdom or lands otherwise than in accordance with arrangements approved by an immigration officer. Subsection (4) creates a presumption that the accused has landed in contraven-

<sup>1</sup> *Hansard*, H.C., 1967-8, vol. 759, col. 1501.

<sup>2</sup> *Ibid.*, col. 1506.

<sup>3</sup> This has occurred before, in the Prevention of Violence (Temporary Provisions) Act, 1939, s. 1., but it was perhaps a legislative oversight. See Parry, *Annual Survey of English Law* (1939), pp. 93-4.

tion of this provision unless he produces a passport duly stamped within the requisite period by an immigration officer.

Thus further *ad hoc* provisions are introduced into the already confused body of law and regulations connected with immigration control. It is high time that this was simplified and rationalized.

### *The Consular Relations Act, 1968*

The consular Relations Act was passed for three main purposes: to give effect to such parts of the Vienna Convention on Consular Relations of 1963<sup>1</sup> as appeared to require legislation; to give effect to other agreements entered into by the United Kingdom; and to deal with the position of consular representatives of Commonwealth countries and the Republic of Ireland. But it is also particularly concerned with the restriction of the jurisdiction of British courts to deal with certain matters arising on board foreign ships, and with the power of consular officers and diplomatic agents to administer oaths and do notarial acts.

The common law contains relatively little in the way of case law on the subject of consular status and immunity, although it has clearly been accepted that a consul enjoys immunity from proceedings in English courts as respects his official acts.<sup>2</sup> The early cases do, however, emphasize that a consul is not a diplomatic agent<sup>3</sup> and he was not regarded as protected by the Diplomatic Privileges Act of 1708.<sup>4</sup> Since 1949, when a Consular Convention was negotiated between the United Kingdom and the United States of America, provision has been made in a series of bilateral conventions for the recognition of the functions, immunities and privileges of consular agents.<sup>5</sup> These Conventions and the Vienna Convention are the subject matter of the legislation under review.

Some provisions of the bilateral Consular Conventions could be implemented administratively, and others merely reflect rules of common law, so that with two exceptions, the power to enter consular premises and the grant of representation to foreign nationals in relation to property in this country, they did not require to be incorporated into English law by statute. The only existing legislation dealing with them was the Consular Conventions Act of 1949.<sup>6</sup> But this would be inadequate for the implementation of the Vienna Convention, for the bilateral conventions either deal with matters falling outside its provisions, or they differ from it in some important details. The Vienna Convention expressly states<sup>7</sup> that it does not affect other Consular Conventions in force nor preclude the conclusion of agreements which may be made in future and which supplement or extend its provisions. The Consular Relations Act therefore states that where in any such agreement whether made before or after the passing of the Act, provision is made for according to consular posts and persons connected with them privileges and immunities not accorded to them by the other provisions of the Act, those powers laid down in Schedule 2 to the Act may be exercised in

<sup>1</sup> Cmnd. 2113.

<sup>2</sup> See Beckett: 'Consular Immunities', this *Year Book*, 21 (1944), p. 34; the principle is contained in modern consular conventions, for example the Convention of 1951 with the United States, Art. 11 (1); see *United States Treaty Series*, 37 (1958).

<sup>3</sup> *Barbuit's case* (1737), Cas. t. Talbot 281; *Triquet v. Bath* (1763), 3 Burr 1478; *Heathfield v. Chilton* (1767), 4 Burr. 2015.

<sup>4</sup> e.g. *Viveash v. Becker* (1814), 3 M. & S. 284. Nevertheless Lord Ellenborough thought that a consul enjoys special protection 'including the right to the liberty and safety necessary for the discharge of his functions'. See also *Clarke v. Cretico* (1808), 1 Taunt. 106.

<sup>5</sup> The United Kingdom has entered into fifteen of these Conventions. That with Poland awaits ratification.

<sup>6</sup> 12 & 13 Geo. VI, c. 29.

<sup>7</sup> Article 73.

relation to the consular posts and persons of the other State, party to the agreement, so far as may be necessary to give effect to it (s. 3 (1)). Schedule 2 extends to classes of persons, such as members of the service staff and their families, some of the privileges contained in Schedule 1 (those laid down in the Vienna Convention) and extends some of the privileges contained in Schedule 1 of the Diplomatic Privileges Act, 1964, for example, the inviolability and protection of the mission and of inviolability of private residences and immunity from jurisdiction and arrest which are granted generally to diplomatic agents and premises but not generally to consular premises or agents.

If by such agreement lesser privileges and immunities are required than those accorded by the Act, the States with which such agreements are made may be excluded by Order in Council from enjoyment of the greater privileges and immunities (s. 3 (2)).

The main objective of the Act is of course the legislative implementation of the Vienna Convention, and here the same technique of drafting is adopted as in the Diplomatic Privileges Act. Thus s. 1 provides that those parts of Articles of the Vienna Convention as appear in the First Schedule shall have the force of law in the United Kingdom. Section 2 provides that where a State which has consular representation in the United Kingdom accords to United Kingdom Consular agents and posts in its territory narrower privileges and immunities than are accorded by the Act, the privileges and immunities of the former may be correspondingly restricted by Order in Council, as is the case with diplomatic privileges and immunities.<sup>1</sup>

*Consular functions.*<sup>2</sup> Consular functions are listed in considerable detail in Article 5 of the Vienna Convention, which is the first article to appear in Schedule 1. In the main they are generally the protection of the interests of the sending State and its nationals within the receiving State; the furtherance of commercial, economic, cultural and scientific relations between the sending State, the exercise of functions of a legal and notarial kind, and certain duties in connection with navigation.

A consul is not of course a diplomatic agent and does not generally fulfil any diplomatic function<sup>3</sup> (this is not to say that his activities may not often take on political characteristics)<sup>4</sup>. He does not represent diplomatically his own State, and he is usually subjected to the directions of his own State's diplomatic mission. But it is perfectly possible for one person to be, say, Ambassador and Consul-General,<sup>5</sup> for consular missions to exist in diplomatic premises, and for the diplomatic and consular services of a State to be combined as has been the case in this country since 1943.<sup>6</sup> Article 70 deals with the exercise of consular functions by diplomatic missions, stating that the provisions of the Vienna Convention apply also so far as the context permits to the exercise of consular functions by a diplomatic mission, and that their privilege and immunities shall be governed by the rules of international law concerning diplomatic relations. If the sending State has no diplomatic mission in the receiving State, a consular office may perform diplomatic acts without enjoying diplomatic status (Art. 17). A British Court must accept as conclusive any statement of fact in a certificate issued

<sup>1</sup> Diplomatic Privileges Act, 1964, s. 3 (1).

<sup>2</sup> For an extensive survey of consular functions see Parry (ed.), *British Digest of International Law*, vol. 8 (1965), especially pp. 211-416; and the same author in *Cambridge Essays in International Law* (1965), p. 122.

<sup>3</sup> See the case of Mr. Henderson in 1860 and the opinion of Sir Robert Phillimore thereon: Parry, *British Digest of International Law*, vol. 7 (1965), pp. 578 et seq.

<sup>4</sup> There is a British consular representative in Formosa, although H.M. Government does not recognize the Government in that island.

<sup>5</sup> See for an earlier example of a person who combined diplomatic and consular functions *Parkinson v. Potter* (1885), 16 Q.B.D. 152, see also *Engelke v. Mussman*, [1928] A.C. 433.

<sup>6</sup> Foreign Service Act of 1943; 6 & 7 Geo. VI, c. 35.



by or under the authority of the Secretary of State where in any proceedings a question arises as to whether a person is entitled to consular privileges and immunities (s. 11).<sup>1</sup>

*Facilities, privileges and immunities.* As to the substance of the facilities, privileges and immunities accorded under the Act to a consular post, Article 31 provides that consular premises are inviolable and that that part of the premises used exclusively for the work of the post can be entered only with the consent of the head of the post or of the head of the diplomatic mission of the sending State. This is not so wide an immunity as is accorded to diplomatic missions, whose inviolability is complete.<sup>2</sup> Article 32 provides for exemption from most forms of local taxation and Article 33 for the inviolability of the consular archives at all times and wherever they may be. Freedom of communication is assured by Article 35.

With respect to the personal inviolability, privileges and immunities of consular officers, a distinction is drawn between career Consular officers and members of a consular post on the one hand, and honorary consuls on the other. As regards the former; they are divided into three categories: (1) The consular officer, which term is defined as 'any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions'.<sup>3</sup> He is not liable to arrest or detention pending trial, except in the case of a serious crime (that is, an offence punishable on first conviction, with imprisonment for five years or more)<sup>4</sup> and pursuant to a decision by the competent judicial authority. This is much narrower than the personal inviolability of a diplomatic agent who is not liable to any form of arrest or detention.<sup>5</sup> He is not amenable to the local jurisdiction in respect of acts performed in the exercise of consular functions, but he has no immunity especially in respect of a civil action arising out of a contract in which he did not contract expressly or impliedly as an agent of the sending State, or an action by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft (Art. 43). He has no immunity from giving evidence in the local courts but he may not be subjected to penalties for declining so to do (Art. 44).<sup>6</sup> He is exempt from dues and taxes in connection with the exercise of consular functions, likewise from customs duties and inspections; and from personal services, from public services, and from military obligations.<sup>7</sup> (2) A consular employee, who is any person employed in the administrative or technical service of the consular post. Such persons are not personally inviolable, but are entitled to the same immunity from jurisdiction as the consular agent; as regards the giving of evidence, they may only decline to do so where matters connected with the exercise of their functions are concerned. (3) Members of the service staff, that is, persons employed in the domestic service of the consular post, who are only exempt from local security provisions, provided they are not nationals of the receiving State and that they are covered by social security provisions in force in the sending State or a third State, and from payment of taxes on wages. Persons in categories (2) and (3) and their families and the family of a member of a consular post who themselves carry on any private gainful occupation in the receiving State do not enjoy these immunities (Art. 57). Special provisions are made for honorary consuls.<sup>8</sup>

Any of the privileges and immunities may be waived by the sending State in the case of any of the members of the consular post. Waiver is to be express and may be

<sup>1</sup> Cf. Diplomatic Privileges Act, 1964, s. 4. This merely states in legislative form the rule of common law as finally established in *Engelke v. Mussman*, cited above, p. 266, n. 5.

<sup>2</sup> Diplomatic Privileges Act, 1964, Schedule 1, Article 22.

<sup>3</sup> Article 1 (d).

<sup>4</sup> Section 1 (2).

<sup>5</sup> Article 29.

<sup>6</sup> Article 31 (2).

<sup>7</sup> Articles 49, 50, 52.

<sup>8</sup> Articles 66, 61; and see Article 71.

communicated by the head of the diplomatic mission or in his absence the head of the consular post.<sup>1</sup> The only case of non-express waiver which is of any effect is where the consular officer or employee initiates proceedings, in respect of any counterclaim directly connected with his own claim (Art. 48).

An important innovation is that regarding nationality; for section 7 provides that a person does not become a citizen of the United Kingdom and Colonies by birth if at the time of his birth his father was a member of a consular post (other than as an honorary consul) serving in the United Kingdom and Colonies, unless his father was at that time a citizen of the United Kingdom and Colonies. Thus the child of a consular officer is placed upon the same footing as a child of a diplomatic agent.<sup>2</sup>

*Maritime functions and jurisdiction.* Of the two other main matters dealt with in the Act, the right of diplomatic agents and consular officers to administer oaths and to deal with notarial and shipping matters, only the second will be discussed.

With respect to the exercise of local jurisdiction over foreign shipping in British waters, the Anglo-American view is that the local jurisdiction extends in principle over matters and acts taking place on board foreign ships and that the local law, both civil and criminal, applies there.<sup>3</sup> This, of course, may give rise to dual jurisdiction of the coastal State and the flag State, and there have been somewhat bitter diplomatic disputes in the past.

Provision is made in the Act for the application, by Order in Council, of arrangements made in bilateral conventions in respect of three matters where the functions of consular officers are concerned:<sup>4</sup>

(1) Provision may be made for the exclusion or limitation of the jurisdiction of any court to entertain proceedings relating to the remuneration or any contract of service of the master or commander or a member of the crew of the State specified, unless a consular officer of that State has been notified of the intention to invoke the court's jurisdiction and he has not objected within a specified time (s. 4). (2) Criminal jurisdiction over offences committed on board a ship of a specified State by the master or member of the crew may be excluded unless a consular officer of the State has requested or consented to the institution of proceedings. But such jurisdiction is never excluded if the offence was committed against a citizen of the United Kingdom or Colonies or other British subject or against anyone other than a member of the crew, or the offence involves the safety or tranquillity or safety of a post or various other matters, or is a 'grave crime' as defined in the Act (s. 5). This almost reverses the traditional Anglo-American view in such matters, and approaches more nearly the continental position.<sup>5</sup> (3) In case of the detention of a member of the crew of a ship belonging to a specified State for a disciplinary offence, such detention is not to be deemed unlawful unless it is unlawful under the law of the flag State, or the conditions of detention are inhumane, or there is reasonable cause to believe his life or liberty may be endangered for reason of race, nationality, political opinion, or religion, in any country to which the ship is likely to go (s. 6).

### *The International Organizations Act, 1968*

The object of this legislation is to make new provisions to replace the International Organizations (Immunities and Privileges) Act, 1950, and the European Coal and

<sup>1</sup> Section 1 (5).

<sup>2</sup> British Nationality Act, 1948; 11 & 12 Geo. VI, c. 56, s. 5.

<sup>3</sup> See generally Parry, *British Digest of International Law* vol. 8 (1965), pp. 355-416.

<sup>4</sup> See, for example, the Convention with the United States of 1951, Article 22.

<sup>5</sup> O'Connell, *International Law* (1965), vol. 2, pp. 683 et seq.

Steel Community Act, 1955. The 1968 Act does not differ much in principle from the earlier legislation, but diverges from it in some details.

In its first section it deals generally with the immunities, privileges and facilities to be accorded to international organizations of which the United Kingdom is a member, and to their officials. This refers to the First Schedule to the Act, which is more detailed than that to the 1950 Act. The amendments made here were necessitated by the codification of the law of diplomatic immunity by the Vienna Convention of 1961.

Section 2, which does not appear in the 1950 Act, deals with specialized agencies of the United Nations which have their headquarters or principal office in this country, then, if an Order in Council is made under s. 1, with respect to such agency, Her Majesty may by Order in Council confer the exemptions, privileges and reliefs specified in s. 2 (2) on officers of the organization who are recognized as holding rank equivalent to that of a diplomatic agent; that is such exemption from taxes and rates as specified in Art. 34 of the 1961 Convention and such exemption from customs duties and regulations as are contained in Art. 36 of that Convention.

The second section of the 1950 Act which provided for publication of lists of persons entitled to immunities and privileges is replaced by s. 8 of the 1968 Act which provides for the conclusiveness of the certificate of the Secretary of State, as in the Diplomatic Privileges Act, 1964 (s. 4), and the Consular Relations Act, 1968 (s. 11).

Section 3 replaces the Act of 1955 by dealing with the position of the Commission of the European Communities and s. 4 goes further in providing that with regard to any other organization of which the United Kingdom is not a party, and which maintains an establishment in this country by agreement and an Order in Council may be made to confer upon it the capacity of a body corporate and to provide for relief from income and capital gains tax.

Section 5 is a very considerable expansion of s. 3 of the 1950 Act in that whereas the latter dealt only with the International Court of Justice, the new section deals with the immunities of members of any international judicial or arbitral tribunal, or of any other body which performs conciliation or inquiry functions.

Section 6 deals with the immunities of representatives at international conferences in the United Kingdom, and is a recasting of section 4 of the 1950 Act in the light of subsequent developments in the law of diplomatic immunity.

J. G. COLLIER





## REVIEWS OF BOOKS

*Académie de Droit international de la Haye: Recueil des cours, 1966.* Volume 117. Leyden: A. W. Sijthoff, 1967. 640 pp. *Recueil des cours, 1966.* Volume 118. Leyden: A. W. Sijthoff, 1968. 642 pp. Dfl. 45 each.

The collection for 1966 commences with lectures by Professor Schwarzenberger on 'The Principles and Standards of International Economic Law'. Within his own framework he gives a clear, lively and informative treatment of the extensive subject matter. Of particular value is the analysis of the standards of international economic law. Professor Schwarzenberger has some interesting comments to make on the fashion for whittling down the rule of absolute immunity of States and subjects the decision in the *Oscar Chinn* case to cogent criticism. Dr. Jenks contributes an interesting and persuasive study of 'Liability for Ultra-hazardous Activities in International Law'. He deals principally with hazards from aviation, pollution, nuclear and space activity, and weather control. The argument is directed towards establishing a general liability for ultra-hazardous activities. Dr. Jenks provides a tentative formulation of the pertinent general principles (at pp. 194-5) and observes that: 'The Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, unanimously adopted by the General Assembly of the United Nations on 13 December 1963, affords a highly suggestive precedent. A Declaration of Legal Principles Governing Ultra-hazardous Activities Generally, adopted in the same authoritative manner, would be a comparable growing point for the future development of the law.' There follows the course by Dr. Mahmassani, a distinguished Lebanese jurist and politician, on 'The Principles of International Law in the Light of Islamic Doctrine'. His purpose is 'to show that the main principles of international law are in conformity with the basic doctrine or philosophy of Islam and perhaps may even be part of that doctrine or philosophy', and his treatment is comprehensive and reasonably succinct. Later in this volume we find a counterpart course of lectures on 'Hinduism and International Law' by Professor Sastry, who relates the doctrinal matter to developments in contemporary international relations.

The collection also includes two studies in private international law. Professor Rigaux examines 'Le conflit mobile en droit international privé' as an aspect of the conflict of laws in space and time and Professor Schwind contributes a short study, 'Le divorce en droit international privé'.

Professor Falk's incisive lectures on 'The New States and International Legal Order' appear in the second volume of the collection for 1966. Whilst the intellectual framework adopted is that of Professor McDougal and his associates, Professor Falk takes issue with McDougal and Lasswell because of their partisanship in deciding that only the United States 'strategy of participation in international society' was compatible with world order. The main emphasis is placed on the problem of regulating violence and there are brief but helpful discussions of the absorption of Goa by India, the Malaysian 'confrontation' with Indonesia and the Stanleyville operation of 1964. The problems of civil strife are well ventilated and the tensions between non-intervention and liberation are made evident. On this last item, as elsewhere in these lectures, there is perhaps too much of an assumption that such problems are new. This perspective results in an unwarranted leaving aside of relevant Latin-American experience of many decades. In his final chapter Professor Falk stresses the needs to improve the tools of

analysis and to find a framework of inquiry within which to collect data about the new States in relation to International Law.

This volume continues with a course by the Spanish jurist Antonio Poch de Caviades, 'De la clause "rebus sic stantibus" à la clause de révision dans les conventions internationales'. This is a very helpful treatment of the subject, which explores its various aspects and makes extensive reference to the doctrinal materials. The discussion, however, makes insufficient reference to state practice and limited use of the materials produced by the International Law Commission. The writer is suspicious of the principle and, unlike the Commission, doubts whether it has a niche in the law. Thus he concludes (p. 194): 'En un mot, la doctrine *rebus*, acceptée en général dans la pratique diplomatique et jurisprudentielle *en tant que principe*, n'a pas encore été, à notre avis, l'objet d'application *en tant que règle positive*. Il faut donc en conclure que la dite doctrine comme règle n'a pas été encore suffisamment fixée ou se trouve, tout au plus, *in status nascendi*.'

Professor Feliciano of the Philippines, a powerful representative of the Yale Law School's approach to International Law, contributes a substantial and most interesting course on 'Legal Problems of Private International Business Enterprises: An Introduction to the International Law of Private Business Associations and Economic Development'. The focus is, of course, upon private investment in developing countries. In his 'conspectus and framework of inquiry' Professor Feliciano provides a good account of the general background though he avoids references to the political and economic problems arising from extensive foreign investment. His own policy prescriptions tend to be very general and to ignore the role of planning and the public sector in development. He takes issue with Judge Guha Roy and others who take a too comprehensively negative view of the customary law on state responsibility. It may be that writers on both sides of this controversy do not distinguish sufficiently between the substance of the law and the manner of its application. The latter has been the greatest source of Afro-Asian suspicion derived from history. Part Two of the course is concerned with the legal problems of access and protection of foreign companies in relation to the actual or potential host State. Of particular interest are the well-expounded sections on diplomatic protection of corporations and shareholders.

'Tendances doctrinales actuelles en droit international privé' is the subject of lectures by Professor Evrigenis of the University of Thessalonica. The extensive material is organized into three sections. In the first American doctrine is considered with particular reference to the varieties of realism and the local critics of realist views. In the second the developments in Eastern Europe are studied on the basis of recent substantial publications of relevant works in French, German and English. The third section is devoted primarily to the work of various continental European jurists, such as Vallindas, Wengler and Kegel. The volume concludes with lectures by Professor de Nova entitled 'Historical and Comparative Introduction to Conflict of Laws'. This attractively presented study includes a substantial account of renvoi and related devices.

IAN BROWNLIE

*Asian-African Legal Consultative Committee. Report of the Eighth Session held in Bangkok, 1966.* New Delhi: Published by the Secretariat. No date. iv+409 pp. No price stated.

The Asian-African Legal Consultative Committee co-operates with the International Law Commission and provides significant evidence of trends of legal opinion in



the developing States apart from Latin America. The value of the work of the Committee is, perhaps inevitably, reduced by the brevity of its sessions in relation to the agenda adopted. The competence of the Committee is very wide and includes the examination of questions under consideration by the International Law Commission and the examination of problems referred to it by any of the participating States. The need to provide reasonably current reaction to legal developments will affect the depth of treatment and there is no connection with an organ which can take action on the advice of the Committee, as in the case of the International Law Commission in relation to the General Assembly. Thus matters may receive superficial treatment in sub-committees and be referred from session to session. In spite of these factors, some interesting drafts and reports have appeared and the present volume contains a final report on the rights of refugees together with the report of the relevant committee and various background materials. Other matters raised for discussion and referred to the ninth session of the Committee were relief against double taxation and fiscal evasion, codification of the principles of peaceful coexistence and the judgment in the *South-West Africa* cases (Second Phase). It would be helpful if an index were to be provided.

IAN BROWNLIE

*British International Law Cases*, Volume 7. Supplement 1951-60. British Institute Studies in International and Comparative Law. No. 1. London: Stevens & Sons Ltd. New York: Oceana Publications, 1969. xxxi+1,270 pp. (1,186 text and 84 pages index). £12. 12s.

This is a supplementary volume to the series of six volumes already completed and contains decisions for the period 1951 to 1960. It also contains a cumulative table of cases reported and a consolidated index to cover the seven volumes. It is to be noted that the volumes collect cases from the Irish Reports as well as those from the United Kingdom. The editing by Professor Clive Parry is thorough and items reported only in *The Times* are usefully included. However, it might be an improvement to refer to other sources if *The Times* is the primary source relied upon: thus, in the case of *Feivel Pikelnny* (see p. 539), reference could have been made to the note by A. B. Lyons, prepared with the assistance of the solicitors for the applicants, which appeared in this *Year Book*, 32 (1955-6), p. 288.

IAN BROWNLIE

*Instruments Relating to the Economic Integration of Latin America*. Prepared by the Inter-American Institute of International Legal Studies. Dobbs Ferry, New York: Oceana Publications, 1968. 452 pp. \$12.50.

This volume is a revised version of a Spanish publication which appeared three years earlier. The compilation and editing are of a good standard. Three areas are covered: the Central American Common Market, the Latin American Free Trade Association, and the groundwork for the Latin American Common Market, proposals for which were the subject of agreement at Punta del Este in 1967. The instruments corresponding to the last mentioned area include items relating to the Inter-American Development Bank and selected resolutions of the Inter-American Economic and Social Council. Apart from a brief introductory note by Dr. F. V. Garcia Amador, no

commentary is provided but the volume contains a substantial bibliography on economic integration in Latin America. The value of such a compilation as this is obvious.

IAN BROWNLIE

*Modern Economic Warfare: Law and the Naval Participant.* By NEIL H. ALFORD, Jr. International Law Studies, 1963 (U.S. Naval War College). Washington: United States Government Printing Office, 1967. xii+415 pp. \$2.25.

Professor Alford of the University of Virginia has contributed the fifty-sixth volume in the series, *International Law Studies*, emanating from the U.S. Naval War College. This series now has a span of sixty-eight years and a number of distinguished contributors to its credit. Each academic year the Naval War College appoints an incumbent to the Chair of International Law whose duties, among others, include the writing of a volume in the *International Law Studies* series.

Professor Alford has devoted his contribution to a study of *Modern Economic Warfare: Law and the Naval Participant*. His task has not been rendered more successful by the fact that his study was written between 1962 and 1964 and published in 1967. Although he has tried hard to free his observations from the trammels of that time span, inevitably subsequent events, not omitting the Vietnam conflict, have had their erosive effects upon some of the legal views and analyses he has presented. However, in his treatment of the legal and economic aspects of the Cuban missile crisis he has contrived to preserve a measure of freshness and stimulus which compels admiration.

He has set himself a modest ambition, namely, '... the hope that his basic analysis of economic warfare, the relationship of this analysis to legal institutions, and the relation of both to naval decision making may become increasingly relevant as relations between the U.S., the Soviet Union and Communist China continue their process of change'. The trouble is that international relations are in their essence dynamic, and no less so between the three States he mentions. The post-1964 changes have done little to assist the validity of Professor Alford's legal analyses however valid they may have been on their own time setting.

The book is divided into two parts: (i) 'Law strategy and naval officers', and (ii) 'The naval participant and economic warfare'. The former has matter of considerable economic interest. The legal matter is somewhat obscured by the writer's thoughts being clothed in that peculiar semantic amalgam borrowed from other social disciplines and which we have come to associate with the Yale Law School. Once the reader has penetrated the penumbra of this peculiar and not attractive literary style he will normally find that much of the thinking so expressed is surprisingly orthodox. Professor Alford does, however, make us increasingly aware of the intimate and complicated nexus between economic power at the disposal of States, and the legal rules, both international and municipal, which control or fail to control its exercise.

His swift and sporadic raids into history tend to be sensational; 'an era in which the Mongol cavalry froze the whole of Europe in an ice of fear' (p. 26), is a typical foray. The equally swift passage from the economic doings of Jenghis Khan to the military doings of General Sedgwick's 6th Federal Corps at the Battle of the Wilderness in 1864, within the space of some ten lines, is slightly disconcerting. The writer's legal

thinking in this part of the book is to be found particularly under the sub-heading 'Perspectives about Law and Lawmaking' (pp. 65-81). The emphasis is upon the role of 'persuasion'. This means, apparently, 'convincing a decision maker that (i) legal institutions and the primacy of values sought through these can and do change; (ii) these changes can be initiated on an administrative level; and (iii) the changes so initiated are compatible with the value preferences of the community whose authority passes upon the economic action'. At first reading these observations might sound somewhat awesome to the 'Naval Participant' in economic warfare, but upon analysis they have no more terror in them than the standard statements of the obvious.

Professor Alford divides, for 'a legal strategist in economic warfare', the basic perspectives about law and lawmaking into three schools: (i) the 'paleofundamentalist', (ii) the 'neofundamentalist', and (iii) the 'behaviouristic' (p. 75). In his view the first two suffer from their close alliance with religious tenets. The writer's sympathies would seem to be with category (iii). It will be odd to some that category (ii) includes most of the legal profession, and a strange miscellany consisting of Karl Marx, Maine and Admiral Mahan. The 'behaviourist' school consider history 'a mass of myth and miranda which will confuse rather than clarify the current administration of law. The behaviourist emphasizes, instead, techniques by which the mind of a decision maker can be opened to the relevance and interrelationship of contemporary events' (p. 79). An admitted weakness of the behaviourist perspective is that it diminishes predictability' (p. 81). What intrigued one reader was the unpredictability of the impact of this part of the work on the naval participant in economic warfare.

A more valuable part of the work is the analysis and description of the legal arsenal of economic weaponry at the disposal of the U.S. in conducting its international affairs in general and its international disputes in particular. Taking the Cuban sugar controversy as an example Professor Alford displays in a very interesting manner the mounting economic pressures available to the U.S., and their relationship with the international and municipal legal rules governing the marketing of that particular commodity. His arguments that the Communist foreign trade system is geared for offensive and defensive economic warfare are convincing. What is less convincing is that the U.S. trade system is geared primarily for the defensive role. On his own showing the U.S. has used its domestic economic legal measures, in response to an economic sortie by the U.S.S.R. in the world sugar market, to considerable effect. It would also appear that it has contrived so to act within the limits of the U.N. Charter, the Charter of the Organization of American States and the G.A.T.T., no mean achievement. This part of the book is rewarding. It is noticeable that it is written in the ordinary style of a text book writer and is, at least in one view, more compelling and convincing on that account.

The second part of the work consists of lengthy discussions of some seven hypothetical situations centred round the Cuban situation. These situations are designed to promote an *exposé* of such legal topics as Neutrality and Internal conflicts, blockade, contraband control and the ancillary 'navicert' system, 'continuous voyage' and 'ultimate destination', and enemy property control at sea. Here the treatment and the language are alike orthodox. In Situation 6 (pp. 259-316), he transposes the Cuban missile threat to one of biological warfare. In so doing he presents a detailed legal analysis of the various arguments posed in favour of the U.S. response to the missile threat. In the result his preference seems to be that the U.S. 'interdiction' action was 'an interim *status quo* preserving technique'. He rests the legal basis for this conception on 'a power implied in every political or legal system, namely, the use of force formally or informally organized to forestall intensive coercion until an authoritative



community decision can be rendered' (p. 315). This rationale, distinct from that of self-defence, he considers to be 'non-competitive with the peace maintenance functions of the United Nations' (ibid). Such an argument sounds well until one's adversary starts to employ it. In arriving at his position the writer seems uninhibited by the Charter of the U.N., twenty-five years of recorded U.N. practice, and the decisions of some international tribunals, let alone the collective opinion of jurists. What may be thought a recurring weakness of the legal arguments advanced throughout the work is an apparent unawareness of their potentially devastating use by the adversaries of the U.S. whether in economic confrontations or more generally. To some, the justifications advanced by the Soviet Union for its recent excursions into Czechoslovakian territory are not unrelated to some facets of international law thinking that have emerged from the U.S. during the recent decade.

What has been said notwithstanding, we are in Professor Alford's debt for many perceptive observations about the possibilities and implications of economic warfare, and for a valuable and often pioneer exploration into that largely uncharted territory which lies between the realities of international economic life and international economic law. What is undeniable is that international economic factors are already of paramount importance both in pacific and hostile international relations. Here the international lawyer can render the international and State community a great service. Professor Alford has made that clear and has warned that both communities will suffer if their respective decision makers do not have international economic lawyers at their elbow. For this message, if for no other reason, this book demands our attention.

G. I. A. D. DRAPER

*State Responsibility for Injuries to Aliens.* By C. F. AMERASINGHE. Oxford: Clarendon Press, 1967. xvi+324 pp. 55s. net.

A reader who opens a new book of State responsibility is bound to entertain high hopes. Is he coming across a work that at long last fills a glaring gap and expounds the circumstances in which a State is liable for injuries to aliens? What are the international torts recognized by law? *Abus de droit*? Discrimination? Failure to respect legitimate interests? When is an excess of jurisdiction contrary to international law? Do the rules about State responsibility apply for and against organizations? These are only a very few of the unanswered questions of a fundamental character, which require clarification against the background of the numerous practical problems arising almost daily. They cannot be solved by theoretical discussions alone. What duties does international law impose upon a State in respect, for instance, of the taxation of aliens, import control, monetary policies, the supply of armaments, and so forth? The law of international responsibility is as inexhaustible as the municipal law of tortious liability. Yet it is probably no exaggeration to say that even the most rudimentary aspects of international torts remain to be defined.

The reader who approaches Dr. Amerasinghe's book with such thoughts in his mind will be disappointed, for in spite of the generality of its title it 'purports to consider some of the problems connected with state responsibility for injuries to aliens in regard to which an intellectual contribution can still be made' (p. 3), and such problems turn out to be, in the first place, those familiar and perhaps somewhat overworked subjects of State contracts (pp. 66-120) and nationalization and expropriation (pp. 121-68). There follows, secondly, a long discussion of the rule of local remedies

(pp. 169-269)—an equally well-explored field, though it can certainly do with some fresh ploughing. These subjects are introduced by certain preliminary considerations on a variety of matters such as the subjection of emergent States to international law and, curiously enough, the sources of international law.

The most useful part of the book, relatively, is that devoted to the rule of local remedies. This branch of the law is in a state of considerable confusion, unfortunately not reduced by some pronouncements of the International Court of Justice, and there is, therefore, certainly room for a scholarly and constructive review. Mr. Amerasinghe analyses the existing material, though he inexplicably ignores the important award of an international Arbitration Tribunal which is to be found in the *International Law Reports*, vol. 25 (1958-I), p. 33. He attaches great importance to the question whether the rule is to be classified as procedural or substantive—a distinction which should not (and, probably, does not) govern the decision of any serious legal problem. In fact he is so preoccupied by this distinction that he omits a critical analysis of the *Interhandel* case. An author discussing the rule of local remedies may be expected to fasten upon the remarkable fact that the International Court of Justice denied Switzerland's right to require arbitration under a treaty. The reason was that the local remedies had not been exhausted. But is this not a point which it was the privilege and duty of the arbitration tribunal to decide?

On the whole it must be concluded with sadness and disappointment that this is not a book from which many readers are likely to benefit to any substantial extent. The author has had the good fortune of having some of the material now included in this book published in American, German and English periodicals. This must be emphasized, for the editors of these periodicals are likely to have formed a more favourable view of the author's work than the present reviewer. Perhaps some readers will prefer the editors' to the reviewer's opinion.

F. A. MANN

*European Community Law and Organizational Development.* By W. ANDREW AXLINE. Dobbs Ferry, New York: Oceana Publications, 1968. ix + 214 pp. \$7.50c.

*L'Adhésion de la Grande-Bretagne aux Communautés (Les Communautés dans l'Europe. Fasc. I).* Brussels: Éditions de l'Institut de Sociologie, 1968. 134 pp. No price stated.

Mr. Axline has written a learned and thoughtful if somewhat long-winded book in which he examines the contribution of the legal institutions of the European Communities to the growth of integration between them in accordance with the views of the functionalist school. After surveying the problem and the various theories of integration that have been put forward he examines the legal situation up to about 1966, first in terms of analytical jurisprudence and then in terms of what he calls sociological jurisprudence. The first argument goes to show the nature of Community law and its relationship to its own lawgiving bodies and to those of the constituent nations. The second, and more original, inquiry is inspired by the American 'realist' school and consists of an attempt to find out what is actually happening by studying the decisions of the courts and the arguments of jurists.

He shows how difficult it is to fit Community law into any of the conventional

categories: 'Community law is a hybrid form, with the existence of separate law-making institutions, suggesting that it comprises an independent and separate body of law, its basis in international treaty suggesting that it is of international law, and its content and area of application showing many characteristics of municipal law' (p. 45). The important thing is that it should have the capacity of autonomous growth and be able to establish its superiority over municipal law in the areas to which it is applicable.

It is important also that law in the Community fields should be uniform throughout the area. In this respect Mr. Axline finds that the situation regarding the binding character of Community law differs a good deal in the several countries. While France and the Benelux countries have on the whole proved to have very receptive legal systems in this respect, the German side is still open (and complicated by the special role of the constitutional court) and in Italy, the 'dualistic' approach to international law prevents the dispositions of the treaties or of the legislation based upon them from being safe from over-ruling by later national lawmaking.

The importance attached by Mr. Axline to overriding the principle *lex posterior derogat priori* gives particular importance to the issues that would face British advocates of membership of the Communities in relation to the sovereignty of Parliament. Mr. Axline does not deal with this question at all, but it was alluded to by Dr. K. R. Simmonds in his contribution to a rather wide-ranging discussion of the general problem of British membership, held under the auspices of the *Institut d'Études Européennes* of the *Université Libre de Bruxelles* in March 1968. Dr. Simmonds does not himself see any great problem here: 'Community law which has direct internal effect (e.g. over restrictive practices, and monopolies and the movement of workers) will take precedence over national law and Parliament *will have to refrain* from passing fresh legislation inconsistent with that law as for the time being in force—or perhaps more safely include automatically in all statutes a *formal clause* to the effect that the statute is to be construed as not conflicting with Community law from whatever source it derives' (p. 18).

What importance can we attach to the words 'Parliament will have to' and what importance would or could the Courts attach to the proposed formal clause about the priority of Community law? Would a British court uphold (as an Italian court did) a claim by a woman for equal pay for equal work on the basis of Article 119 of the Rome Treaty? And what would the Prices and Incomes Board say if it did?

If one accepts as does Mr. Axline (who is an American) the integrationist good faith of the members of the Communities, one has a yardstick by which to measure the contribution of the courts. But the issue is a real one and not merely a technical one. To judge by the contrasting tones of Dr. Simmonds's and Mr. Douglas Jay's contributions to the Brussels colloquium, our legal profession may be ahead of political opinion in this respect, which if true would be curious.

MAX BELOFF

*Legal Aspects of Foreign Investments in the European Economic Community.* By W. H. BALEKJIAN. Manchester University Press. Dobbs Ferry, New York: Oceana Publications, 1968. xxix+356 pp. £3. 6s. (or \$8).

Among members of the English legal profession interest in developments in the E.E.C. has once more dropped to the low level which it occupied until a thoroughly Utopian movement succeeded in inducing the naïve belief that Britain's entry was impending. This detachment is, of course, deplorable. British industrial and com-



mercial concern with Common Market developments remains unaffected by political developments. Naturally, the ways in which an expansion into Europe becomes possible are different. The economic sectors, in which it is possible, may remain restricted. But the necessity for proper legal consideration has become no less urgent, though perhaps more difficult.

A work such as the present could therefore perform a most useful function. The learned writer, who is thoroughly acquainted with the legal literature of the E.E.C. countries and possesses a knowledge and degree of understanding of the economic and financial problems which is only too rare amongst legal writers, would be well qualified to provide such a work. This is all the more true as he writes smoothly and clearly and understands the art of selecting from a vast bulk of material those aspects which are of paramount importance to firms from outside the E.E.C. and their advisers.

Unfortunately the task, which he has set himself, involves difficulties of a size and kind that even the most skilful writer could hardly overcome and whose total effect must necessarily be to reduce the usefulness of his well intentioned work. There is first the size of the work. The author tries to provide a summary of the law of the six countries on exchange control, companies, taxation, investment incentives, employment of aliens, restrictive practices, patents, protection of foreign investments and their judicial control—all on no more than a total of 143 pages. It is a courageous *tour de force*. But one must seriously ask whether the information, which could be given in such a small space, can be of value to anyone, except to those who know virtually nothing.

The second difficulty is that of the time required for printing and publication. The learned author's research was completed in March 1965. The date of publication of his book was 22 February 1968. These were three vital years in European legal developments. Much of what the author has to say on both the laws of the individual E.E.C. countries and the Community law itself was necessarily and even obviously out of date at the time when his book was published. To give a few examples: the German company law for *Aktiengesellschaften* has been recodified. So has the German law relating to restrictive practices. The added-value-tax has come into force in all six countries. The preparations for a European patent and a European company law have progressed further than he could envisage.

A third difficulty is that of the scope of any such book. Within the framework of a single volume the author could not possibly deal with any more topics than those which he covered. Firms from outside the Common Market, however, will necessarily be greatly interested in a good many other aspects of law. Free movement of labour, social insurance burdens and benefits, powers of the State to influence and determine collective bargaining: these are only some of the topics that anybody who considers setting up in business in the Common Market will wish to examine most seriously. That the author could not deal with them within the scope of his work is clear. But that this is a serious gap is equally undeniable.

The author's research was unfortunately concluded before the publication of Dr. Temple Lang's masterly study which in many ways supplements, and in others goes beyond the author's work. The two works together may well form an entrance door for British companies and their legal staff to Common Market law, provided that those who use them remain conscious of the fact that they are covering part of the ground only, that in this turbulent field much of what they say was out of date by the time of printing and—last, not least—that the learned authors and in particular Dr. Balekjian could not provide more than the bare outlines which may lead to, but will not replace, a far more detailed study. It is no doubt a sad but an inevitable conclusion that there is

really only one way in which the English-speaking profession could obtain in full the information that it requires: by a large-size loose leaf work written and kept up-to-date by a team working within the frame of a permanent scientific institution. Until such a work can be produced books like Dr. Balekjian's may be welcomed and perform a useful function, but—with all due respect to the author's learning and skill of presentation—only within clearly and narrowly defined limits.

The author is very optimistic about the protection of private property in the Common Market and the safety that its laws provide against confiscation without compensation. It would be interesting to learn whether he maintains this cheerful view in the face of the recent decision of the highest German legal authority, namely the German Federal Constitutional Court, which declared the extension of the adjustment of burdens of legislation to foreign investors as fully compatible with international law although this entails a levy equivalent in value to no less than one-half of all foreign investments held in Germany on the day of the currency reform of 1948.

E. J. COHN

*The Israel-Syrian Armistice.* By N. BAR-YAACOV. Jerusalem: The Magnes Press, 1967. 377 pp. \$7.50.

Dr. Bar-Yaacov has been very unfortunate in the timing of his book, which appeared just before the 1967 June war. The armistice regime which he examines was already ailing: now the Israel Government has declared it, along with the other three Israel-Arab Agreements, irrevocably dead. It would be a great shame, however, if these events prevented Dr. Bar-Yaacov's book from being as widely read as it deserves. Its interest has not been relegated to that of the purely historical. The legal issues are intrinsically interesting, and the manner in which they arose and the way in which they were handled carry important lessons for the future.

The four armistice arrangements established in the Middle East in 1949 met with varying degrees of success. The most satisfactory was that between Israel and Lebanon. The Israel-Egypt Agreement was bedevilled by the underlying controversy as to whether rights of belligerency could legally exist within an armistice regime. And the Israel-Jordan and Israel-Syrian Armistices each contained within them the seeds of genuine legal controversy, which political tensions were bound to nurture.

It is the Israel-Syrian Armistice which Dr. Bar-Yaacov has chosen as the subject of his book, and his detailed examination will be immensely useful to all concerned with the legal issues in the Middle East. The Chief of Staff of U.N.T.S.O. reported regularly, and publicly, to the Security Council, but comprehensive listings of the decisions of the Mixed Armistice Commissions were not included, and those that were mentioned usually appeared in an abbreviated form. Dr. Bar-Yaacov has relied not only on the Security Council documents and official records, but clearly has had access to materials at U.N.T.S.O. headquarters, and conversations with U.N.T.S.O. personnel. He is thus able not only the better to bolster his legal judgment, but also to provide us with information not readily available elsewhere. Nor should it be assumed that this information is all of a controversial nature—for example, students of peace-keeping will be grateful for the detailed breakdown of the field organization of U.N.T.S.O. which appears in footnote 36 on p. 308. The author has also performed a signal service in providing a clear map, of manageable size, of the Israel-Syrian frontier and armistice lines. It is not generally realized that only two of the four

armistice agreements (Israel–Jordan and Israel–Syria) have maps attached; and that anyone wishing to study these needs a spare wall, so large are they.

The status of the demilitarized zone has been at the heart of legal controversies arising from this armistice. The Chairman of the Mixed Armistice Commission was, under Article V (c) of the Armistice Agreement, to exercise general supervision of the civil administration; but was not to administer the zone himself. Israel took the view that the zone in fact remained under her sovereignty, though she had voluntarily limited its exercise for the duration of the armistice. She thus regarded Syria as having no *locus standi* in respect of civilian matters in the zone, and as only entitled to raise military matters. Israel further argued that on non-military matters the proper course was for discussion between the Chairman and the party concerned, on the grounds that under Article V it was the Chairman, and not the Mixed Armistice Commission, who had responsibility for over-seeing civil administration in the demilitarized zone. Syria took a different view of things, believing the status of the zone to be *sui generis*, giving her a proper *locus standi*, which could be pressed through the M.A.C. even though the Chairman was responsible for implementation of these particular armistice provisions.

This reviewer believes that the Armistice Agreement was indeed ambiguous on these points, and that each party could in good faith advance the arguments recounted above. Their difference of view became important because it emerged in the context of Israel civilian works in the zone—specifically, the project for draining the Hula marshes. Syria claimed that even though a civilian project, its success would give Israel a military advantage, which was prohibited under Article II (1). Israel now relied on collateral legal evidence—namely, Dr. Bunche's statement to the Security Council upon the conclusion of the armistice, and accepted by both parties, that the demilitarized zone was not meant to become a wasteland.

Dr. Bar-Yaacov clearly explains the complexities of this controversy as well as the parallel dispute over the use of the Jordan waters. Here, too, the 'no military advantage' clause of Article II (1) was at issue, as well as the meaning to be given to Article V of the Armistice Agreement. On the broader question of utilization of shared waters, the author sets the problem within a thoughtful essay on the relevant principles of international river law. This book also contains a detailed account of the legal arguments surrounding the pattern of incidents on Lake Kinneret (Tiberias), and a briefer summary of the events of June–October 1966—which may perhaps be said to have triggered the unhappy sequence of events which led to the June war of 1967. This last section is necessarily less complete and detached than the rest of the volume, for the book initially went to press in June 1966.

This study also contains a very useful historical background to the Israel–Syria Armistice negotiations, thus providing us with the necessary *travaux préparatoires* in both the wide and narrow sense. And there are two invaluable essays appended—on the armistice supervision machinery and on the legal nature of demilitarized zones in general. The appendices contain the text of the Armistice and—not generally available elsewhere—the rules of procedure of the Israel–Syria M.A.C., as well as a bibliography.

Dr. Rosenne, in the book *Israel's Armistice Agreements with the Arab States*, provided a scholarly statement of Israel's case. Dr. Bar-Yaacov, surveying a narrower front but in greater detail, has adopted a somewhat different stance. Throughout Dr. Bar-Yaacov is at pains to present fairly the legal arguments advanced by Syria as well as by Israel. He explains the arguments, but does not always tell us where he regards the better case as lying. If on occasion one would like the author to go beyond



description to advocacy, his reluctance is a very acceptable price to pay for an impartial, scholarly study by a national of a Middle Eastern nation. It would be very healthy for the state of international law—and for the prospects of peace in the Middle East—if works of comparable integrity could be forthcoming from the law teachers of all the nations concerned.

ROSALYN HIGGINS

*Staatliche Immunität.* By M. M. BOGUSLAVSKIJ. Translated from the Russian by Wera Rathfelder. Berlin: Berlin Verlag, 1965. 270 pp. No price stated.

As soon as one realizes that this book, published in West Berlin, is the work of a Soviet author and originally appeared in Moscow in the Russian language, one knows its message and can almost precisely foretell the line of argument it presents.

'The Soviet State, always the consistent protagonist of the sovereignty of the State and of all principles derived from it, accepts without restrictions the principle of the immunity of the State and its property and fights against discrimination. It wants peace and aims at the development of international economic relations on the basis of complete equality of all countries and the mutual respect for sovereignty of the State part of which is economic independence. In its relations with other nations, big or small, it observes strictly the principle of sovereign equality' (p. 20). Accordingly, Soviet doctrine 'considers the principle of immunity as absolute' (p. 22) and 'the theory of the functional immunity is inconsistent with public international law which in our time is called upon to regulate international co-operation on the basis of coexistence and the equality of States as well as non-intervention. The fundamental evil of that theory is that in essence it is contrary to the principle of the sovereignty of the State' (pp. 42, 43). To the author it is satisfactory, therefore, that 'the principle of sovereign immunity is most consistently being observed in English judicial practice' and that 'the attempt of the adherents of functional immunity to influence English judicial practice in its favour failed', when the Inter-Departmental Committee was disbanded in 1953 (p. 56). Or, 'the observance of the principle of immunity does not by any means hinder trade, but prevents the assertion of unjustified claims against a State and, accordingly, the paralysis of normal commercial intercourse' (p. 208).

And so on. Is it necessary to say more about a book of so predictable a character? In his Preface Professor Wengler of the Free University of Berlin refers to 'the joke of world history' (p. 7) which renders the old idea of sovereign immunity as an emanation of sovereignty a firm ingredient of Soviet legal thought. In truth it is a cloak designed to render political aims respectable. It is a mere 'form of embellishment', but it will require greater ingenuity than this reviewer possesses to discover a truly legal reason 'behind' it. In short, the level of legal discussion is so low that there is nothing to be gained from reading what Professor Wengler rightly describes 'as a tract in support of the Soviet standpoint' (p. 8). The only positive benefit which can be derived from this book is an increased and renewed determination to advocate a reform of English law so as to terminate its companionship with Soviet doctrine in this field.

F. A. MANN

*Streitkräfte internationaler Organisationen. Zugleich ein Beitrag zu völkerrechtlichen Grundfragen der Anwesenheit fremder Truppen.* By MICHAEL BOTHE. *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, No. 47. Köln, Berlin: Carl Heymanns Verlag KG, 1968. xii+192 pp. DM. 22.50.

Corresponding to its title and sub-title, this study consists of two parts, equal in volume and importance. The first one deals with the organization of international military forces and their status with regard to the international body sending them out and to the home States of the different contingents. The other part explains the status of the forces with regard to the receiving State, and the legal relations existing between the force and the organization or State behind it on the one hand, and the receiving State, its nationals and the parties involved in rebellion on the other hand.

The author proceeds from fact-finding and he analyses rather thoroughly the different affairs in which forces sent out by the League of Nations, the United Nations and regional organizations have acted to restore or to preserve peace and order. The Korean affair, by the way, is not included because it was, in the opinion of the author, military action of the United States on behalf of the United Nations (pp. 61-9). Notwithstanding his inductive approach, the author shrinks not at all from formulating rules quite clearly and from reducing the variety of cases into a system. He discards the question of recognition altogether as irrelevant and insists on the necessity of applying international military law; for the intricate and doubtful situations in which international peace forces have been employed must be governed by a body of law adapted to emergencies. This is possible because there is no relevant difference between forces sent out by States and forces which are constituted as organs of international bodies. The mere presence of foreign forces on the territory of a State engenders legal relations, and the international organization sending them becomes subject to the pertinent rules (p. 87). This is quite independent of the question whether in general international organizations are subjects of international law; the author accords them only relative subjectivity and it is only in the case of the United Nations that he takes the view that there is legal status *erga omnes* (pp. 10 et seq., 34).

The consent of the receiving State, if established, clears up many issues; and yet, one must not interpret such consent as a transfer of sovereign rights to the organization or to the force, and the subjection of the force to the law of the receiving State does not mean extension of jurisdiction by the latter over the members of the force (pp. 139 et seq., 160). The consent of the receiving State, moreover, does not exempt military actions against rebels from the general law of warfare; the conflict is an international one (pp. 101 et seq.). The study may arouse additional interest in the reader by recalling succinctly many other controversial points, e.g. the binding force of United Nations resolutions (pp. 114 et seq.), the action in Katanga (pp. 107 et seq., 165), the responsibility of an organization for excesses committed by the international forces (pp. 53, 149 et seq., 166 et seq.), and the confused Dominican affair (pp. 110 et seq.).

F. MÜNCH

*The Mixed Courts of Egypt.* By JASPER YEATES BRINTON (Revised edition). New Haven: Yale University Press, 1968. 305 pp. 112s. 6d.

The first edition of this book had been published in 1930 when the story of the Mixed Courts of Egypt had still nineteen years to run. In the intervening period the

treaty of Montreux (1937) established a new regime introducing important reforms. Now, twenty years after the closing of the Courts in 1949, the author, one of its judges, gives in the present edition a complete account of its seventy-five years of history. The plan of the establishment of the Mixed Courts of Egypt, conceived in 1867 by Nubar Pasha (Khedive Ismail's Foreign Minister) came as a reaction against the confusion created by the regime of capitulations which degenerated into a complicated network of arbitrary European laws 'varying with the character of each new diplomatic chief'. Nubar Pasha's plan sought to bring some order into the prevailing legal chaos and the Mixed Courts entered the Egyptian scene after a prolonged diplomatic battle. They were inaugurated in 1875 on the basis of a Charter which in its essence was an international agreement. The Mixed Courts were national Egyptian (non-capitulatory) Courts composed of European and Egyptian judges and they comprised a Court of Appeal in Alexandria and three District Courts sitting in Cairo, Alexandria and Mansourali. The jurisdiction of the Courts in ordinary civil and criminal cases covered all suits 'between Egyptians and foreigners of different nationalities' except questions involving the 'statut personnel' (which in the French meaning of the term included domestic relations, marriage and divorce, parent and child, guardianship, etc.) These questions were left to the jurisdiction of other tribunals. The Mixed Courts also had jurisdiction over all cases involving land, arising between foreigners, even of the same nationality. They regarded as foreigners not only the subjects of those capitulatory powers which participated in the establishment, but also subjects and citizens of all foreign nations irrespective of the constituent treaty. Though the Charter of the Courts founded their jurisdiction on the difference of nationality between the parties to a dispute, in practice the Courts assumed jurisdiction in all suits where a 'mixed interest' was discoverable although the actual parties to the dispute may have been local citizens. The application of the principle of 'mixed interest' was an important element in enlarging the influence of the Mixed Courts in Egypt. This was particularly the case in disputes relating to corporations controlled by foreign capital, even if they were established under Egyptian law. Commerce was 'an inexhaustible subject of litigation in Egypt, and merchantmen which passed through the Suez Canal carried with them lawsuits in their cargoes'. *Sic transit gloria mundi.*

Judicial methods applied by the Mixed Courts were essentially French. The system absorbed the distinction of French judicial organization between civil and commercial Courts but the principle of 'cassation' was adopted for criminal cases only. Nubar Pasha had tried to endow the Mixed Courts with full criminal jurisdiction over foreigners but his efforts were not successful. Their criminal jurisdiction was confined to police offences and offences touching directly the administration of justice in the Mixed Courts. All other criminal offences committed by foreigners belonged to the jurisdiction of Consular Courts. But the Treaty of Montreux changed the position.

The Mixed Courts administered their own law as found in codes and statutes interpreted by judicial decision, a veritable mine of comparative law which must even today have the authority of a classic experiment.<sup>1</sup> The author coming from a common law country says on the basis of years of judicial experience that he found the differences between the systems of Roman and common law greatly over-emphasized. When the judges were unable to find a principle to be applied to the facts of the case, they resorted to principles of natural law and equity, a term applied by Judge Philli-

<sup>1</sup> See a review of the first edition by C. Sumner Lobingier, *American Journal of International Law*, 25 (1931), p. 170.



more to the general principles of law when they were first drafted prior to the establishment of the Permanent Court of International Justice. The author also draws our attention to the fact that the Anglo-Saxon doctrine of the immunity of the State from suit was not adopted by the Mixed Courts; neither was the French concept of administrative justice. The Courts applied the theory of complete governmental responsibility except for acts of sovereignty which were acts related to the status of the State as sovereign as illustrated in treaties and diplomatic relations, in acts directly relating to the administration and judicial organization of the State, to the exercise of legislative functions and in acts relating to security and the conduct of war. As to foreign governments the Mixed Courts assumed jurisdiction in disputes against such governments whenever they were engaged in commercial enterprise or had entered into obligations of an ordinary civil nature not involving the exercise of governmental powers *sensu stricto*.

The Mixed Courts existed side by side with the Consular Courts and the Islamic Religious Courts administering Koranic law. In case of conflict between Mixed Courts and local courts, precedence was always given to the former as to a judicial agency based on a treaty, a source of authority which under Egyptian law prevailed over statute law. After 1911 the Court of Appeals of the Mixed Courts became a sort of legislative assembly with authority to approve on behalf of the participating powers all modifications and additions to the 'mixed law'. The Montreux Treaty gave the Mixed Courts the jurisdiction hitherto exercised by Consular Courts, i.e. in matters of personal status and criminal law. The second Article of the Treaty declared that subject to principles of international law foreigners should be governed by Egyptian legislation in criminal, civil, commercial, administrative, fiscal and other matters. In 1949 the Mixed Courts closed their doors after having performed one of the most successful experiments in judicial administration in which principles of international law and the law of the Mixed Courts maintained a prolonged and fruitful co-existence. The author should be congratulated for giving us in this revised edition a complete account of this great judicial experiment.

C. H. ALEXANDROWICZ

*International Protection of Human Rights*. Edited by John Carey. Hammar-skjöld Forum, No. 12. Dobbs Ferry, New York: Oceana Publications, 1968. x+116 pp. \$6.00.

This short but well-documented text, comprising the working paper and proceedings of the twelfth Hammar-skjöld Forum, supports the 1968 observance of Human Rights Year and the United Nations inter-governmental conference at Teheran. A useful bibliography plus appendices of human rights documents (e.g. the *Proclamation of Teheran* and pertinent resolutions adopted at the 1968 conference) are added.

The purpose is to evaluate the effectiveness of the methods and techniques employed at the regional and international levels to protect individual human rights against arbitrary actions by States. Within this context, the thrust of the working paper, and commentaries by Richard A. Falk, Louis B. Sohn, Sean MacBride and A. A. Mohammed, is directed toward those techniques of implementation 'used in the past by international organizations to protect individuals from oppression by their own governments' (p. ix). Thus, a selective review of prior U.N. attempts to safeguard human rights, e.g. declarations and resolutions from the General Assembly,

conventions and accompanying devices of implementation and enforcement in relation to future schemes seeking global improvement, is effectively presented. However, the participants, while considering such phases as adjudication, negotiation, conciliation, investigation, publicity and compensation, in terms of the advances made by the United Nations and Council of Europe, devote the greater portion of their arguments toward the regime of *apartheid* as practised not only by the Government of South Africa but also within South West Africa. *Apartheid* is, moreover, declared to constitute an international crime against humanity (p. 62). Accordingly, the book, quite properly, joins in denouncing the white regimes in southern Africa.

The participants take a dynamic approach toward the emerging network of human rights conventions, including the United Nations Human Rights Covenants, and means are sought by which existing machinery can be strengthened. Thus, the law-making capacity of international and regional institutions is emphasized. The study also recommends as follows:

'The relative success of various international organizations such as the I.L.O., the two regional human rights commissions, the High Commissioner for Refugees, and the Red Cross in using certain procedures for the protection of human rights indicates the feasibility and desirability of a permanent U.N. office [a High Commissioner for Human Rights] with a mandate broad enough to encompass such methods. [A] number of methods for international protection of individuals have demonstrated their usefulness . . .' (p. 18.)

Some of the conclusions can be questioned on grounds of impracticality because of the political climate; none the less, the book stresses those judicial aspects essential to the future protection of private individuals against gross violations of their fundamental rights by States, espousing absolute sovereignty. Each participant, including R. F. Botha representing the South African Government, comes to grips with the basic issue: the confrontation between the right of States to be free from interference with their domestic jurisdictions, as memorialized in Charter Article 2 (7), and rapidly expanding United Nations activities. The solution offered is the promulgation of conventions, creating supranational standards (p. 37). Fortunately, the spirit of idealism surrounding Human Rights Year proposals has not prevented a clear recognition of existing derogations of fundamental rights and the impossibility of achieving immediate solutions.

W. PAUL GORMLEY

*Criminal Jurisdiction under the United States Philippine Military Bases Agreement.* By JOSEPH W. DODD. The Hague: Martinus Nijhoff, 1968. xiv + 143 pp. Guilders 18.

As the author says in his introduction, apart from the NATO Status of Forces Agreement (S.O.F.A.) of 1951 and to a lesser extent the United States Japanese Agreement of 1960, little attention has been given to the many treaties governing the important question of jurisdiction over military forces stationed abroad. Professor Dodd has succeeded in redressing the balance somewhat by this study of the criminal jurisdiction provisions of the agreements concluded between the United States and the Philippines in 1947 and 1965.

Professor Dodd analyses these two agreements and sets them in their legal and political context, examining their background and comparing them with similar treaties, notably the NATO S.O.F.A. Thus after explaining that the 1947 agreement

gave the United States authorities wide jurisdictional powers embracing, for example, all cases in which an American committed an offence against a Filipino on a military base, Professor Dodd contrasts the narrower provisions of the NATO S.O.F.A. and suggests some reasons for the difference. He goes on to describe how the emergence of strong nationalist sentiments, accompanied by a number of incidents of varying seriousness but vivid political impact, rendered the 1947 agreement less and less acceptable to the Philippine Government, the outcome being the 1965 agreement, which by substantially bringing jurisdictional arrangements into line with the NATO S.O.F.A. solved most, though not all, of the problems. The author's account of all this, his analysis of the cases and incidents and his discussion of the treaty provisions, though rather brief, are clear and well documented and raise a number of points of interest.

Jurisdictional problems in the Philippines were in some respects rather unusual. There was, for example, the problem of the bases' civilian guards, pagan indigenous tribesmen, loyal to the United States but hostile to the local Catholic population. Thieving was another major problem especially serious where, as in the Philippines, a United States base is an oasis of wealth in a desert of poverty. The startling information that no less than 564 bombs were stolen in one year from one United States base vividly illustrates how in such a situation jurisdictional problems may be linked with problems of safety and security.

Of general importance is the influence which the NATO S.O.F.A. seems to have exercised in the negotiation of the 1965 agreement. In the light of this and the similar 1966 agreement with Korea Professor Dodd seems to be justified in tentatively concluding that 'the NATO S.O.F.A. is performing a general *de lege ferenda* function by projecting the standard for an international norm relative to the right to exercise criminal jurisdiction over members of a visiting force', and in predicting further moves towards bringing other treaties into line with the NATO S.O.F.A. In view of the unsettled state of customary international law on this matter the developments discerned by Professor Dodd are very much to be desired.

In a brief final chapter the author draws some thoughtful general conclusions and here, as elsewhere, one wishes that Professor Dodd had expanded his argument and perhaps incorporated into the text some of his longer footnotes. The index is adequate and the bibliography extensive but it is rather surprising to find that there is no appendix setting out the relevant parts of the 1947 and 1965 treaties. The book is well printed with only a few minor misprints. It is to be hoped that as a lucid and interesting account of an important subject Professor Dodd's book will be widely read.

J. G. MERRILLS

*L'Organisation des pays exportateurs de pétrole: étude d'une organisation internationale pour la défense des intérêts privés des États.* By MUSTAFA EL-SAYED. Paris: *Librairie générale de droit et de jurisprudence*, 1967. 219 pp. 25 fr.

The members of the Organization of Petroleum Exporting Countries (Saudi Arabia, Iran, Iraq, Kuwait, Venezuela—founder members; plus Qatar, Indonesia and Libya) have had in common the overwhelming dependence of their economies on oil production. At the same time, of the advanced industrialized countries only the U.S.A. and the U.S.S.R. have any considerable oil reserves, and the world economy is very



dependent on production in the O.P.E.C. countries (about 40 per cent of the world total). Outside the Soviet bloc and China, both the production of oil and the processing and marketing of petroleum products are carried out by a small number of immense international corporations. Thus the exploitation of one of the world's main natural resources is controlled by oligopolistic corporations, which by virtue of the international nature of their operations can evade most attempts at national governmental control.

Until very recently the operations of the oil companies in the colonial possessions and political and economic dependencies of the industrialized States were carried out on terms which gave little benefit to the countries whose resources were being virtually plundered. The first attempts by these countries, in the mid 1950s, acting in isolation, to strike a better bargain, met with only moderate success, although in general the terms of the oil concessions were improved. The oil companies' unilateral decision to reduce the posted prices of crude oil in 1959 and 1960 drastically reduced the advantage thus gained, and the strong common reaction of the 'under-developed' oil-producing States led to the formation of O.P.E.C. Since this volume was completed there has been concluded an Agreement for the Establishment of the Organization of Arab Petroleum Exporting Countries, which may reduce the unity of O.P.E.C.

The essential background is quite well, although rather lengthily, given in the first part of this monograph, which also compares the various concession agreements and analyses their legal nature, summarizing most of the debate on this issue. It is only the last third of the book that is in fact devoted to O.P.E.C., and covers its constitution, legal personality, composition, structure and powers. The essential aim of the organization is to enable these oil-producing States to maintain a united front against the international might of the oil cartel. It is therefore more an international pressure-group or trade union than an organization of the usual type. Mr El-Sayed suggests that an attempt should be made to include also oil-consuming countries, and turn the Organization into something more like those regulating other commodities; but while the essential power lies with the oil companies, this would seem unrealistic. Of the commodities really only the beverages, whose production can hardly be considered of strategic importance, have been subjected to any effective international regulation, and even then not without difficulty. However, one would have welcomed a more thorough examination of the possibility of international regulation, in the context of an analysis of the changing nature of the political economy of the oil industry.

S. PICCIOTTO

*Foreign Policy and International Law.* By CHARLES G. FENWICK. Dobbs Ferry, New York: Oceana Publications, 1968. xii+142 pp. (including index). \$6.00.

International law may be most effectively understood in the framework of history, for its rules and doctrines have no real significance except in the context of the actual dealings of States. Moreover, initially, comprehension of the subject and its evolution may be enhanced by single-mindedness—by looking out, as it were, through the windows of a Foreign Office, or the State Department, and seeing the world through the eyes of potential policy-makers of a major power. This book contemplates many and examines a few of the problems of the world and of international legal relations in

precisely this way. The work might, indeed, quite properly have been entitled: 'American Foreign Policy and the American Attitude to International Law and Relations', for it presents to the reader the views of the intelligent, well-informed, orthodox American.

Even in western Europe, America is frequently misunderstood. This exposition of a more or less normal American attitude, patriotic but in no degree chauvinistic, is undoubtedly helpful to any reader genuinely wishing to understand United States policies. In the process of meeting the American mind the reader is also introduced to the concept and development of the law of nations. While the work is short, running to about sixty thousand words, it is very much to the point, and will serve as a working guide to the layman or a beginner's manual for the student of international law, whether his study be part of a course in law, jurisprudence, modern history or international relations.

But its very brevity occasions difficulties in a work of this order. Mr. Fenwick might, for instance, be accused of putting too many questions without offering solutions. A good deal of the text is lightweight, especially with regard to jurisdiction and denial of justice. And to remark that one of the traditional modes of non-war hostility is 'pacific blockade' without explanation or distinction from belligerent blockade, might be regarded as inadequate. Nor is his distinction between retorsion and reprisal satisfactory. It is true that retorsions are 'minor measures' and that reprisals may be 'measures of redress . . . similar to the injury complained of', but a more precise legal difference can be urged which marks off the one species of retaliation from the other. And early in the book an attempt to distinguish between the concept of 'State' and that of 'nation', even as these terms were understood a century ago, gives rise to questionable definitions. There are a few value judgments which are, necessarily, a matter of opinion. Nevertheless, it is somewhat sweeping to assert that the League of Nations 'had failed to accomplish its purpose' so that, at the end of the Second World War 'what was needed was a bold break with the past'. Leagues neither succeed nor fail of themselves—it is their members and those who refuse to join them who determine success or failure. And if the United Nations represents this 'bold break', it hardly justifies the stricture on the League.

Mr. Fenwick's work is to be commended to those about to begin the study of international law, and to interested laymen. It should be quickly followed by further reading, as its own footnotes suggest. At the end of the book is a list of works referred to and an adequate index.

D. J. L. BROWN

*Le G.A.T.T.: droit international et commerce mondial.* By THIÉBAUT FLORY. Paris: R. Pichon and R. Durand-Anzias, 1968. iv+306 pp. No price stated.

This wholly admirable work must rank as the definitive study of the G.A.T.T. Economically written, with that analytical elegance and order which characterize French studies of this kind, its greater part describes the G.A.T.T. in movement, its goals and the obstacles in their path. But the formal elements of structure and the procedures of the contracting parties are not neglected, and the third part of the book shows that, though more loosely built than some the G.A.T.T. has evolved into an international organization, which has greatly extended the techniques of multilateral trade negotiations and assumed a useful arbitral role.

The mechanism of conciliation, used by the contracting parties at a number of points in the G.A.T.T. with the assistance of expert panels, has had a large measure of success. Dr. Flory describes fifteen disputes that have been resolved either by abandonment of a measure contrary to the G.A.T.T. or by a compromise. He attributes the success to a pragmatic approach, to the *dépolitisation* of disputes, and to the application of expertise in the panels.

The heart of the G.A.T.T. is non-discrimination in international trade. The first part of the book is devoted first to the negative forms of the principle: the most-favoured-nation standard, the condemnation of quantitative import restrictions, and the control of dumping, export subsidies and restrictive practices; and then to its positive forms: the reduction and elimination of tariffs. Of particular interest is the way in which the G.A.T.T., though unlike the Havana Charter it contains no express provisions on the matter, has moved into the field of restrictive trade practices by inducing consultations upon them between contracting parties (pp. 50-7).

The second part describes the adaptation of the principle of non-discrimination to regional arrangements, to the trade relations of developing countries and to the practice of State trading. It is again a mark of the pragmatism, with which the contracting parties administer the G.A.T.T., that a number of legal questions of the compatibility with it of E.E.C. and E.F.T.A. were deliberately set on one side unanswered. In describing the negotiations, and the establishment of other free-trade areas, such as C.A.F.T.A., L.A.F.T.A. and the arrangements concluded between Australia and New Zealand, and the United Kingdom and Ireland, Dr. Flory exposes the ambiguities and limitations in the concepts of a customs-union and a free-trade area to be found in Article XXIV of the G.A.T.T. In discussing the association agreements between the E.E.C. and developing countries, and in particular the dispute as to whether the 'association' was a free-trade area or a new preferential system, he brings out with clarity and force the inadequacy of the original G.A.T.T. for developing countries. The most-favoured-nation standard works equitably only for countries of approximately equal economic development, and Article XVIII introduced in 1955 to permit derogations from the principle of non-discrimination for developing countries was ineffective and seldom invoked. The new Part IV added to the G.A.T.T. in 1967 reaches much further and may yet help to bridge the gap between rich and poor countries.

The possibility of accommodating State trading countries in the G.A.T.T. has been slowly realized. Dr. Flory shows how, despite difficulties, Czechoslovakia remained a party to the G.A.T.T. and how Yugoslavia and Poland, the latter after a period of association, became parties in 1966 and 1967. How far this course can be held for them may now be in question.

J. E. S. FAWCETT

*Das de facto-Regime im Völkerrecht.* By J. A. FROWEIN. *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, vol. 46. Köln, Berlin: Carl Heymanns Verlag KG, 1968. xii+243 pp. DM. 38.

The young author starts from the dilemma in which the theory of recognition is involved. Although, in the opinion of this reviewer, recognition today is not constitutive on the international plane, the author does not want to take a decision on the character of recognition. The problem which really complicates the issue is the particular position of the Anglo-American practice for which the application of foreign law



depends on the recognition of the regime governing the foreign country. British practice mitigates the consequence of this doctrine by admitting a duty to recognize an effective foreign regime, but American diplomacy seems to maintain a political discretion in the decision whether to recognize. The author shows some sympathy with legitimacy tests at the end of his work.

His main interest is in the international status of an unrecognized State, regime or government, and he sets out to prove by practice and by *necessitas juris* that a pacified regime *de facto* is bound and at the same time protected by the interdiction of violence. Then he expands on other aspects of relations with *de facto* regimes, for example the possibility of bilateral and multilateral treaty relations, of international liability of and claims against such regimes, forms of intercourse and representation, immunity and application of the law of *de facto* regimes—here he proposes a restriction of the Anglo-American doctrine so as to concede a minimum standard to the individual depending in law from a *de facto* regime. Succession of the *de facto* regime to legal positions held by the legal regime, and succession of the legal regime after an unsuccessful *de facto* regime is the subject matter of the last chapter of the main part of this book.

The author has assembled much material and has processed it very carefully. His opinions are not so revolutionary as they might seem at first view. For instance, Sereni considered insurgents as territorial entities subject to international law (*Diritto internazionale*, ii, 1958, pp. 765–70); and when Frowein argues that international law is rather the law regulating the exercise of sovereign power than the law existing between entities of a certain quality, he concurs in the view held by many recent Italian authors, without citing them. However, a thesis by Ulrich Erdmann, *Nicht-erkannte Staaten und Regierungen* (Göttingen, 1966) takes much the same direction.

Interesting are the sidelights thrown on questions like Rhodesia and Israel (pp. 41, 67, 68, 231), but of course the implications of the author's theses mainly concern the divided States and the regimes deriving from them. He endeavours very earnestly to find some rule of order applying to them without taking the much too easy path of capitulating before facts. On the contrary, he wants to leave the legal qualification of and the application of the legitimacy test to *de facto* regimes free from any restraint caused by practical considerations.

This reviewer would not follow the author when he, in the first part of his valuable book, seems to refute the doctrine of the declaratory character of recognition on the ground that it is so uncertain in practice. Rules of law are not so difficult to evolve; it is subsumption of facts under the rule that so often proves hard. And the amount of litigation depends not so much on the clarity of the rule involved as on the reasonableness of the interested parties. Actually we have to put up with much illwill in international relations, but we would be wrong to give up the idea of law and order. In fact, the author follows quite another idea when he insists (pp. 66 et seq.) with much emphasis on the necessity, in the interest of peace and order, of accepting the rules he has developed on the position in law of the *de facto* regimes. So we have a very pleasing equilibrium between inductive and deductive reasoning.

F. MÜNCH

*Space Law*. By GYULA GÁL. Leyden: A. W. Sijthoff. Dobbs Ferry, New York: Oceana Publications, 1969. 320 pp. Dfl. 38

This book is, in fact, a second revised edition of the original Hungarian text *Világűrjog*. It comprises two introductory chapters on space and space law, treats the

problems of sovereignty in outer space, the legal status of outer space and celestial bodies, of space objects and astronauts, liability for damages caused by space activities, problems of practical exploitation, e.g. meteorology and telecommunications, and rounds off the study with material on co-operation in research by governmental and non-governmental international organizations. It is therefore quite a comprehensive textbook, if not as voluminous as *Aerospace Law*, 1969, by Professor N. Mateesco Matte.

Space law is quite a human and terrestrial affair, part of current national and international law. The international law side is, of course, the more important and interesting one. The sources of international space law are those of international law in general. There is the peculiarity that it has developed very fast, and we can speak of customary law only when we drop the element of long standing and of age. But modern theory, especially in Italy, admits of the spontaneous formation of rules of law, and we can look at the judgment of the International Court of Justice, in the *North Sea Continental Shelf* cases, to find much reasoning on the nature of this problem.

Still, in expanding the details of space law, the author often neglects to distinguish the principles of general international law from both the dispositions of treaty law and the desiderata *de lege ferenda*. Of course, in a relatively new subject, those distinctions are difficult to maintain, the more so as the role of the United Nations resolutions is not clear. The author has some excellent remarks on this point (p. 45), but the reader might find that the resolutions are given too much weight in the later developments. Also, the author has sound objections in the face of assumptions of *lacunae* in the law of space (pp. 131 et seq.) and he propounds six rules as part of general international law.

Apart from these rather abstract rules, he characterizes space and celestial bodies as *res communis omnium* (pp. 122 et seq., 139, 173, 200), and he clearly distinguishes space law and air law (pp. 136 et seq.). Still, he does not venture to draw a fixed limit between air space and cosmic space, but follows what is known as the functional division.

Another important question is the limitation of the use of space to peaceful purposes, and the author interprets this principle as prohibiting any military use (p. 171), including defence and reconnaissance. That does not, however, curtail the right of self-defence against an imminent attack from outer space (p. 184).

From the *res communis* thesis it follows that celestial bodies, in spite of the prohibition of appropriation, could be exploited by anybody (p. 200), but the author infers from Art. 9 of the Space Treaty the general rule that exploitation must consider the general interest—a rule which is sound in itself, but had to be introduced in maritime law by a long series of special conventions. Here again is an example of the difficulty in distinguishing general law, conventional law and *lex ferenda*.

F. MÜNCH

*The Conflict of Laws*. 6th edition. By R. H. GRAVESON. London: Sweet & Maxwell Ltd., 1969. xxxix+698 pp. Hardback £4. 10s. od. Paperback £2. 8s. od.

Professor Graveson's *The Conflict of Laws* has in the last twenty years achieved considerable success as an introductory work for students. It is by that criterion that it must be judged. No radical changes have occurred in the sixth edition, which states the law up to December 1968. The fifth edition did carry out a considerable reorganization in that the work was divided into two parts, one dealing with general principles

and the other with particular rules of jurisdiction, choice of law and recognition. This arrangement has now been improved by moving the chapter entitled 'The Limits of Application of Foreign Law' (on public policy, justice and morality, foreign penal and revenue laws etc.) into Part I. There is also in Part I additional material on the incidental question and the time factor. A chapter on trusts has been added to Part II, though matters like agency, copyright, insurance and patents are still excluded. These changes, and the discussions of recent major developments in such areas as polygamous marriages, the recognition of foreign divorces and tort, account for an increase of 104 pages in the text proper.

The book's main virtue is that it states the law concisely and reasonably clearly. The writer also devotes some space to desirable reforms, and in this connection makes frequent and welcome references to the discussions of the Private International Law Committee and the Hague Conference on Private International Law. Since the work is in many ways only an introductory one, its readers will often have to refer to Dicey and Morris or non-English works as well as periodical literature, but on the whole it is well suited to undergraduate needs. This general judgment should be borne in mind in considering the particular criticisms made below.

Professor Graveson, in this work, is reluctant to take a clear stand on controversial issues. He does make many suggestions for reform, but there are other places where he is strangely silent. The reader would be glad of his views on issues like the desirability of the rule in *Sottomayor v. De Barros* (No. 2);<sup>1</sup> whether English courts should adopt the 'proper law of the tort' theory (a course admittedly apparently closed for the time being after the House of Lords decision in *Chaplin v. Boys*,<sup>2</sup> given after this edition was published); whether it is right to apply English law whenever a divorce petition is properly brought before an English court, so that it is 'immaterial that the matrimonial misconduct on which the petition is based was committed in some foreign country in which at the time of the commission the parties were domiciled . . . [and] immaterial that the misconduct at such time constituted no ground for divorce, if in fact it is a ground for divorce in England and the parties subsequently acquire an English domicile' (p. 306). A related possible criticism arises from his tendency merely to state without comment obscure or confused rules of law. A good example of this is his discussion of the House of Lords decision in *Indyka v. Indyka*,<sup>3</sup> concerning the jurisdictional bases on which an English court will recognize a foreign divorce.

He says: 'Although each of the five judgments in this case differs from the other four, none is dissenting; and the general principle will be recalled that every reason for decision, whether or not logically necessary in the light of other reasons (whether of the same or other judgments in the case), makes law and binds inferior courts' (p. 324). This may be true; but only if a 'reason for decision' means 'a reason agreed on by a majority'. Such a reason is often difficult to discover. How far are there such agreed reasons for decision in *Indyka*? This is a question which the writer, in his understandable enthusiasm for the Law Lords' evident willingness to widen the jurisdictional bases for recognition, fails to ask. He does list (p. 325) the various bases of recognition, but in a confusing way. The effect of his list is to suggest that domicile as a basis is approved by only two Law Lords, and the rule in *Armitage v. Attorney-General*<sup>4</sup> by only one; but both bases were unanimously approved. The list suggests that only one Law Lord supported the rule in *Travers v. Holley*,<sup>5</sup> but all five agreed with the result of the case, two approved of the reasoning, Lord Pearson approved of

<sup>1</sup> (1879), 5 P.D. 94.

<sup>2</sup> [1969] 3 W.L.R. 322.

<sup>3</sup> [1967] 3 W.L.R. 510.

<sup>4</sup> [1906] P. 135.

<sup>5</sup> [1953] P. 246.



the reasoning but said that it should only apply in relation to legislation of a 'general and apparently permanent character—not related to special and transient conditions',<sup>1</sup> and Lords Reid and Wilberforce thought the reasoning was unsatisfactory. Graveson is confusing in a different way by making it unclear how far the other bases mentioned were made intelligible by the House: he does not adequately indicate or criticize the vagueness associated with residence, or Lord Pearson's readiness to recognize divorces granted on the basis of a looser test for domicile than the English one, or Lord Reid's readiness to recognize divorces granted by the court of the last matrimonial home. On the issue of the nationality of the parties, Graveson reports their lordships' views but fails to show how many difficulties were left unresolved by the House. What is the effect of dual nationality? What happens when a single country has several law districts? Must both parties be of the same nationality as the court granting the decree, or only the petitioner, or either party? Will the decree of country A divorcing nationals of country B be recognized in England if recognized by the courts of country B by analogy with *Armitage v. Attorney-General*?

The problems of nationality in the conflict of laws might have been more helpfully discussed by the House of Lords, and Professor Graveson, had they considered the judgment of the International Court of Justice in the *Nottebohm* case (Second Phase) on nationality in public international law. Liechtenstein brought the case against Guatemala to obtain redress for Guatemala's having arrested, expelled and expropriated one Nottebohm, a German national whose main links were with Guatemala but who had been granted nationality by Liechtenstein. The Court decided that 'nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments . . . It may be said to constitute the juridical expression of the fact that the individual on whom it is conferred . . . is in fact more closely connected with the population of the State conferring nationality than of any other State'.<sup>2</sup> The Court held that this general rule could not be evaded by Liechtenstein's granting Nottebohm nationality, so that Liechtenstein had no *locus standi* to bring the case. The law thus stated is tempered by the fact that an act of naturalization will generally be presumed valid, since governments are presumed to act in good faith, and since a status once conferred will not be invalidated or not recognized save in clear cases. The judges in *Indyka* might have clarified the law by stating that a decree by the national court will *prima facie* be worthy of recognition save on proof that there was in fact no effective link or that the successful petitioner acquired it to evade the law. The views of the International Court on evasion of law might also have been thought relevant, since Lords Pearce and Wilberforce and Professor Graveson discuss this doctrine.

More might have been said of the 'real and substantial connection' test advanced in the House of Lords. A similar test is used by English courts in determining the proper law of a contract, and by American courts in determining the proper law of a tort. In tort the vagueness and lack of predictive capacity of the test is no drawback since parties will more often have to go to court after a tort than they will to determine their present married status, and the court can be relied on to do substantial justice. In contract the test is in practice only used where the parties have not clearly chosen a law to govern the contract, and in any event the vagueness of the test is not a serious problem. International contracts are made by men with more awareness of the law than spouses; there can be no such thing as a limping contract; the human suffering and uncertainty caused by a limping marriage is not comparable with the economic

<sup>1</sup> [1967] 3 W.L.R. 510, 561-2.

<sup>2</sup> *I.C.J. Reports* (1955), 4, 23.

suffering of a party whose contract is held, perhaps wrongly, to fall on the wrong side of the test for the proper law. In family law not only is the test vague, but the House did not make it clear whether it is law and if so what factors satisfy it. What relation does it have to Lord Reid's willingness to recognize divorces given by the court of the matrimonial home? How relevant is residence, or earlier domicile or nationality, or the place of the celebration of the marriage? Post-*Indyka* cases have begun to clarify the new legal position,<sup>1</sup> but Graveson's account of it gives a wholly false clarity. There never was a case which showed more clearly the need to give, if possible, only one majority opinion. It must now be very difficult to advise clients on their matrimonial status without going to court. The obscurity of the case should perhaps have been brought out more by Graveson, and he also makes no reference to some of the most revealing comments on it.<sup>2</sup>

Some less important recent decisions might have been discussed more fully. The possibility that Cheshire's well-known theory that capacity to marry is and should be governed by the law of the intended matrimonial home has some application was indirectly raised by *R. v. Brentwood Superintendent Registrar of Marriages, Ex parte Arias*.<sup>3</sup> H, an Italian domiciled in Switzerland, was divorced in Switzerland from W1. His national law denied him capacity to remarry, and his personal law recognized this incapacity. The Divisional Court rejected arguments that the normal rule, referring capacity to marry to the law of the domicile, should not apply, and offered as an additional reason that this was a case where 'both parties have the same foreign domicile and that is also their intended domicile after the marriage'.<sup>4</sup> This suggests that if the parties had intended to make their home in some country which held H capable of remarriage, then as long as English law recognized the divorce (as it did here, since the Swiss domiciliary law did), English law would permit and recognize the remarriage even though the personal law did not. However that may be, Graveson's general discussion of the intended matrimonial home theory is not very helpful, because he does not consider whether it should be part of English law. Whatever the theory's defects, it is an interesting one, and its application might justify decisions like *Sottomayor v. De Barros* (No. 2), the reasoning of which is unsatisfactory as it stands. Cheshire's theory is precisely the sort of issue which should be fully discussed in a work for university students.

Occasionally Graveson fails to refer to a crucial authority which would clinch his argument. For example, when discussing how the domicile of a wife is determined for purposes of jurisdiction in nullity suits, he might have referred to *Garthwaite v. Garthwaite*, where Diplock L. J. shows clearly that '... the test whether a court is bound to decline jurisdiction *in limine* is whether the facts alleged in the petition would, if true, deprive the court of jurisdiction to determine it'.<sup>5</sup> So if a marriage is alleged to be void, the wife can rely on a domicile acquired independently of her husband and obtain relief. Graveson reaches the same conclusion, but relies on the

<sup>1</sup> *Peters v. Peters*, [1967] 3 W.L.R. 1235; *Angelo v. Angelo*, [1968] 1 W.L.R. 401; *Mather v. Mahony*, [1968] 1 W.L.R. 1773; *Tijanic v. Tijanic*, [1968] P. 181; *Brown v. Brown*, [1968] 2 W.L.R. 969.

<sup>2</sup> Dicey and Morris, *Conflict of Laws* (8th ed., 1967), First Supplement; Lipstein, [1967] *Cambridge Law Journal*, p. 182; Mann, *Law Quarterly Review*, 84 (1968), p. 18; North, *Modern Law Review*, 31 (1968), p. 257.

<sup>3</sup> [1968] 3 W.L.R. 531; see Chesterman, *Modern Law Review* 32 (1969), p. 84.

<sup>4</sup> [1968] 3 W.L.R. 537. The explanation for the Divisional Court's apparent adoption of the 'foreign court' theory of renvoi to refer to Italian law is obscure; for though the case was argued on the basis that renvoi was reserved, the doctrine is usually applied only to avoid injustice, not to create it.

<sup>5</sup> [1964] P. 356, 392-3.

more obscure authority of *De Reneville v. De Reneville*.<sup>1</sup> Again, while discussing the recognition of polygamous marriages, the writer might have mentioned those decisions by tribunals under the National Insurance Acts that polygamously married wives of contributors are not entitled to widow's or maternity benefit, and also the legislation which reverses their effect by providing that a marriage performed outside the United Kingdom under a law which permits polygamy shall be treated as a valid marriage for any purpose of the Acts, if the marriage has in fact been monogamous at all times.<sup>2</sup>

Evasion of law is a doctrine which recently has been discussed by English courts much more than formerly.<sup>3</sup> English law has for a long time had a rule of public policy that commercial contracts which are designed to break the laws of a friendly foreign State by infringing its governmental interests are unenforceable in England.<sup>4</sup> But this involves not so much evasion as actual breach of foreign law. English law probably also has a rule about evasion of the English conflict of laws rule on the proper law of the contract, though this view rests more on principle than authority. The only authority is Lord Wright's dictum that a choice of the proper law by the parties must be '*bona fide* and legal'.<sup>5</sup> Graveson is unwilling to allow the doctrine of evasion much scope (he criticizes Lord Wright at p. 433). But he adheres to the subjective theory of the proper law as based on the presumed or actual intention of the parties, and this theory leaves open the possibility of undesirable choices by the parties to evade some inconvenient restriction in the law of the country with which the contract has in fact the most substantial connection. This possibility is admittedly largely academic, but so too is the dispute between the objective and subjective theories of the proper law. Given that the writer devotes considerable space to that dispute (pp. 424-34), he should devote more space to discussing the decisive advantage of the objective theory: that it avoids any possibility of evasion.

Graveson again handles the issue of evasion uncertainly as it emerges from the recent cases. Before these cases he regarded the doctrine as unnecessary in English law.<sup>6</sup> Yet he does not criticize Lord Pearce's desire in *Indyka* to distinguish 'between those jurisdictions which purvey divorces to the foreign market and those which are genuinely trying to make laws for the divorce of its citizens (including its genuine residents) to whom its duty lies'.<sup>7</sup> The writer then says (apparently on a strict interpretation of the *ratio decidendi*) that evasion of law applies only to the recognition of foreign divorces; this is immediately contradicted (p. 330, n. 76) by a reference to the cases of *Arias* and *Weston*. The reason for denying the husband a capacity to remarry in *Arias*, apart from reference to his personal law, was that the court should not 'assist the parties to the proposed marriage to circumvent personal laws valid in another country relating to status'.<sup>8</sup> It seems unfortunate that a doctrine new to English law should be invoked so as to enforce a Swiss law which grants a divorce but not the capacity to remarry, and yet leaves the ex-wife capable of remarriage. The

<sup>1</sup> [1948] P. 100.

<sup>2</sup> National Insurance Act 1965, s. 113 (1); National Insurance (Industrial Injuries) Act 1965, s. 86 (5); Family Allowances Act 1965, s. 17 (9).

<sup>3</sup> In *Indyka v. Indyka* (above); *R. v. Brentwood Superintendent Registrar of Marriages, Ex parte Arias*, [1968] 3 W.L.R. 531; and *Re Weston's Settlement*, [1968] 2 W.L.R. 1154.

<sup>4</sup> *De Witz v. Hendricks* (1824), 2 Bing. 314; *Foster v. Driscoll*, [1929] 1 K.B. 470; *Reggazoni v. K. C. Sethia (1944) Ltd.*, [1958] A. C. 301.

<sup>5</sup> [1939] 1 All E.R. 513, 521.

<sup>6</sup> *Recueil des cours*, 109 (1963), Ch. 4.

<sup>7</sup> [1967] 3 W.L.R. 510, 544. Morris, *Cases on Private International Law* (4th ed., 1968), pp. 153-4, points to an internal confusion in Lord Pearce's theory of evasion.

<sup>8</sup> [1968] 3 W.L.R. 531, 538.



writer makes no comment on the desirability of thus discriminating between the spouses and leaving the husband the choice only of celibacy or fornication. What if the divorce decree had been obtained in England by the first wife under the Matrimonial Causes Act 1965, s. 40 (1) (b)? The *lex fori* would surely prevail over the *lex domicilii*, in spite of the fact that the husband was evading his personal law. What about Sachs L. J.'s view<sup>1</sup> that even if the chances of Swiss courts' recognizing the English marriage were good, English courts should not permit the marriage, for that would be to impose English views on Switzerland? The doctrine of evasion carried thus far has intolerably serious consequences for individuals like the husband in this case.

In *Weston*, the court's leave was sought to vary settlements under the Trustee Act 1925, s. 41 and the Variation of Trusts Act 1958, s. 1, the purpose being to reduce taxation by changing the settlements from English to Jersey settlements. A similar application had succeeded in *Re Seale's Marriage Settlement*,<sup>2</sup> where an English court approved the substitution of a Canadian for an English marriage settlement after the family involved had acquired a domicile of choice in Canada. Stamp J. refused leave in *Weston*, distinguishing *Seale* on the ground that there the family were likely to continue living in Canada, while in *Weston* the beneficiaries had no ties with Jersey and were unlikely to continue living there; the Jersey courts were also said not to be competent to administer trusts of English origin. Stamp J. offered as an additional reason his view that the arrangement was only 'a cheap exercise in tax avoidance which I ought not to sanction, as distinct from a legitimate avoidance of liability to taxation'.<sup>3</sup> The Court of Appeal stressed this point in dismissing the appeal;<sup>4</sup> but the distinction propounded by the judges is a very difficult one and this extension of the doctrine of evasion seems as unfortunate as that made in *Arias*. In the light of these problems, readers would have been interested to know what the writer thinks of the doctrine and of its necessity in English law, bearing in mind the residual protection given by the doctrine of public policy.

Graveson, in discussing the essentials of marriage, draws one curious distinction (at p. 276). 'Both matters of capacity and provisions of positive law prohibiting marriage on various grounds, chiefly consanguinity, are treated as essential requirements and governed by the law of the domicile. . . . Perhaps the only principle one could adopt for such a distinction is that of natural incapacity . . . [e.g. infants under puberty, persons already married, lunatics], all other restrictions being matters of positive law.' He then attacks the courts for not drawing the distinction properly; but does it exist? Children under puberty, married persons and lunatics are not treated as incapable of marriage because of any 'natural' incapacity, it is simply that 'marriage' is so defined in English law as to prevent these persons becoming 'married'. Rules about marriage are not the sum of certain 'natural incapacities' and 'positive prohibitions'. The rules can either be regarded as all to do with incapacities in the sense that breach of a rule renders one incapable of validly marrying, or all about positive prohibitions, capable of being phrased in the form: 'You shall not validly marry unless . . .'. Further, as Graveson admits, it makes no difference which way the courts classify any particular rule, since both incapacities and prohibitions are treated as essentials, governed by the law of the domicile. What really worries Graveson is not any supposed confusion in drawing this non-existent distinction but his dislike of decisions like *Re De Wilton*,<sup>5</sup> which rendered void a marriage permissible by the *lex loci celebrationis* and the religious law of the parties because the English domiciliary law was infringed. Some of

<sup>1</sup> Ibid., 539.

<sup>2</sup> [1961] Ch. 574.

<sup>3</sup> [1968] 2 W.L.R. 1154, 1162.

<sup>4</sup> [1968] 3 W.L.R. 786.

<sup>5</sup> [1900] 2 Ch. 481.

these decisions might be (though they rarely are) supported on public policy grounds analogous to those underlying the Marriage Act 1949, s. 2, which provides that 'A marriage between persons either of whom is under the age of sixteen shall be void'. There are intelligible reasons for this invalidation of a marriage between (for example) an adult English domiciliary and a ten-year-old whose domicile permits such a marriage. But *Re De Wilton* cannot be so supported. The main reason why such decisions occur is the considerable interest shown by English law in matters of personal status, and the relation of status to the personal law. This interest might perhaps be thought excessive, but the writer approves of it (p. 235). He therefore should have made it plain that these decisions result not from a faulty application by the courts of a false distinction, but from the very nature of the Anglo-American rules as to conflict of family laws of which he approves, and the unfortunate effects of which can only be avoided by radically changing the basis of the system.

One unsatisfying feature of the book is its discussion of justice, which the writer believes to be the fundamental force behind the conflict of laws (pp. 7-12 and 43-4). He attempts to prove this by reliance on the judges' oath and judicial dicta. These pages are pointless, for it would be a strange court that stated its main aim to be injustice. A more profitable inquiry would be what the courts mean by justice in practice, and this cannot be carried out without a detailed discussion of the alternatives open in particular cases. Graveson does no more than equate justice with fairness, and state that it reflects ethical and moral values; but this takes us no further.

The possible criticisms are minor in relation to Graveson's achievement as a whole. His book may not aspire to the exhaustiveness of Dicey and Morris, or the unreliable brilliance of Cheshire, but its sound and concise workmanship should commend it strongly to all tyros in the study of the conflict of laws.

J. D. HEYDON

*Die europäische Menschenrechtskonvention.* By HEINZ GURADZE. Berlin and Frankfurt a. M: Verlag Franz Vahlen, 1968. xx+276 pp. DM. 28.

This commentary is composed of a general survey of the character and scope of the Convention, followed by an examination in detail of its provisions Article by Article, supported by extensive bibliographies. The survey covers the origin of the Convention, its territorial scope and its status in internal law, and there is a particularly useful section on its exceptions clauses. A comparison is also made between the Convention and the Basic Law (*Grundgesetz*) of the Federal Republic of Germany, and indeed this, and the increasing application of the Convention by the German courts (p. 41), appear as the main theme of the work.

The examination in detail of Convention provisions consists of a combination of references to relevant provisions of German law, learned literature, and decisions of the Convention bodies. But the method has the defect that the references are too often signposts only, and the discussion of the issues posed by the Convention provision in question, or by its comparison with the analogous rule of German law, or by a particular Commission decision upon it, is left incomplete. This is especially true of such matters as detention pending trial or the exhaustion of domestic remedies. Nevertheless, compressed though it is, the book will be an illuminating compendium for the German lawyer, either as practitioner in his own courts or as adviser to applicants to the Commission.

J. E. S. FAWCETT

*The Middle East Crisis: Test of International Law.* Edited by John W. Halderman. Law and Contemporary Problems Series, No. 11. Dobbs Ferry, New York: Oceana Publications, 1969. viii+193 pp. \$7.50.

This work comprises twelve essays prepared for a conference arranged by the American Society of International Law and held in March 1968. Each paper is by a different author, the last alone being a joint contribution, and, apart from the first essay, the scope of which is more general, every paper deals with one or more specific topics relating to circumstances occasioned by the advent of the State of Israel. The enterprise is interesting not only by reason of this diversity of authorship but also because the contributors include persons who have represented some of the countries directly concerned with Palestine and which have participated in the conflicts there since the Second World War. By putting forward Jewish and Arab opinions with an almost partisan fervour, these writers have added the urgency and alarming realism of genuine sentiment to accomplished, well-informed expositions.

In his foreword, the editor admits that 'many informed people' may regard 'law and the Arab-Israeli conflict . . . as having little in common'. Conflict and disorder, being the negation of law as commonly understood, are a standing continuing challenge to the whole concept of international law. The fifth essay, which is the editor's contribution, probes the difficulty of maintenance of order in Palestine and its immediate surroundings by collective action, pointing out that the result of failure might be the third world war.

The detached reader of this book will probably be left with feelings in which but a little hope is blended with overmuch fear. The first essay, by Quincy Wright, summarizes the main events leading to the present impasse. Thirteen legal issues are listed as relevant and discussed. Professor Wright concludes that with regard to three of these issues Israel has been at fault and must be criticized for the annexation of Jerusalem, continued occupation of territory beyond the 1949 armistice lines, and failing to compensate or rehabilitate Arab refugees. He asserts, however, that the Arab powers have also been wrong in three respects: first, by continuing to maintain a state of war with a fellow member of the United Nations; secondly by refusal to recognize the statehood of this member; and thirdly, in closing Suez and the waters of the Gulf of Aqaba (and the Strait of Tiran). An impartial reader may feel dissatisfied with the rather light way in which Professor Wright dismisses the injury inflicted on the Arabs by British policy, and with his argument that although the Arab objections both to the Balfour Declaration and the proposed partition put forward in 1947 were 'originally valid', these matters had become, as he puts it, 'moot after the general recognition of Israel and its admission to the United Nations'. Nor is such a reader likely to be impressed by the astute special pleading in the third essay, which is an apologia for the State of Israel by Shabtai Rosenne.

Muhammad H. El-Farra and Nabil Elaraby, writing respectively of 'The Role of the United Nations *vis-à-vis* the Palestine Question' and 'Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements' provide a more convincing account of the tragedy of Palestine, showing clearly how the Zionist 'foot in the door' has worked, and why. But the Arab powers have made difficulties for themselves. As the editor reminds their sympathizers, to countenance violence by India in Goa is to weaken the ethical force of the case against the presence of a State of Israel in Palestine imposed despite the wishes of the majority of the inhabitants of the region.

Moreover there is now a large Jewish population in the country. Why not, then,



settle for 'A Binational Approach to the Palestine Conflict'?—a solution which Don Peretz, a professor of political science, urges for serious consideration. But even if this commends itself its realization is likely to be postponed. In the meantime there is the major difficulty of keeping the peace. The only available instrument is the United Nations and, in the view of the editor, to make this sufficient for the purpose may require evolution within the organization, in particular the further development of the functioning of the General Assembly, 'some basic rethinking of the Charter to the end of formulating a coherent theory, upon which may be developed a system capable of maintaining peace and security'.

As yet, however, the United Nations has abjectly failed to do justice in the Middle East where the sometimes foolish policies of America, Britain and the Soviet Union have done great harm, and where clumsy latter-day efforts of the last-named, to redress a balance it once helped to disturb, have aggravated rather than alleviated the misery previously engendered.

This book is too busy talking to notice that salient point, but it is a useful work because it puts together, very shortly, so much information and argument, relating local issues to the environment of the modern world. The problem of the refugees; the regime of waterways; the legality of formal war and the use of force; the role of the United Nations; the potential contribution of natural law and natural justice, of the principle of self-determination—all these confront the inquirer. The condition of Jerusalem provokes a number of 'if only' suggestions, the consummation of which would demand a good deal of objectivity and impartiality. Ironically the final essay discusses the physiology and psychology of human observation, hinting at wider, philosophical assessments at once essentially practical and yet detached from the immediacy of practice. It would have been a practical help to supply an index.

D. J. L. BROWN

*The Relevance of International Adjudication.* By MILTON KATZ. Cambridge, Mass.: Harvard University Press, London: Oxford University Press, 1968. 165 pp. £2. 7s. 6d.

This short book consists of six lectures given by Milton Katz, Henry L. Stimson Professor of Law and Director of International Legal Studies at Harvard Law School, in a special 'Program of Instruction for Lawyers' conducted by the Harvard Law School in Honolulu in July 1967 under the co-sponsorship of the University of Hawaii and the Bar Association of Hawaii.

There is probably no subject of greater general interest to international lawyers than that of international adjudication and it is fitting that it should have been treated in depth by a distinguished American lawyer. For although this is in no sense a treatise like the works of Jenks (*The Prospects of International Adjudication*), Lauterpacht (*The Development of International Law by the International Court*) or Rosenne (*The Law and Practice of the International Court*), it is equally not a superficial work. It deals with fundamentals in that the author probes the question why more use is not made of international adjudication for the purpose of curbing violence and resolving controversies—these functions being, in the author's view, the main functions of international law.

Professor Katz sees in the growth of international organizations during the last century a 'mutation' of international law. It is a mutation which, however, has so far

achieved only a very limited success. The principal limiting factors are, in his opinion, the Cold War and the tension between established industrialized States and newly emerging States. It has become unfashionable recently to propound in the bald terms that were once employed that there is a fundamental distinction between legal (justiciable) and political (non-justiciable) controversies. While not expressly returning to the older doctrine, Professor Katz comes close to it when, in the more muted language of the present age, he distinguishes, on the one hand, between 'the optimum conditions' for adjudication and, on the other hand, the 'point in the spectrum where the limits of adjudication are reached'. Optimum conditions exist 'when the tribunal is long established in the regard of the people, who have seen it tested in a long and varied experience. The principles and standards to be applied by the tribunal in deciding the issues are accepted by the society in the sense that they emanate from established sources and through established procedures. The principles and standards for decisions have been established prior to the acts giving rise to the controversy. The principles and standards are precise and definite and are applied to the particular issue by an established method'. It is also necessary that the issues have restricted implications, that the consequences of a decision one way or the other be easy to foresee, that the persons involved be few, that only a very small fraction of society be associated with them and that to society at large—and even to the parties themselves—it be more important to sustain institutions for an orderly and expeditious disposition of disputes in general than to arrive at this or that outcome in the particular dispute. Seen against this background, it is not difficult to understand why progress in international adjudication is slow. Professor Katz rams the point home to his American audience by declaring that, notwithstanding the finding by the Supreme Court of the United States in 1892 that controversies between the United States and an individual State could be decided by the Court,<sup>1</sup> the issue which arose between the United States and the Confederacy in 1861 was nevertheless non-justiciable. Lincoln had bluntly asserted in his first inaugural address that 'the Union is perpetual' and that 'if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers', whilst, as an example of a typical Southern view, may be taken the Milledgeville resolution (1850) which declared 'we (the people of Georgia) hold the American Union secondary in importance only to the rights and principles it was designed to perpetuate' and 'the State of Georgia . . . will and ought to resist . . . to a disruption of every tie which binds her to the Union, any future Act of Congress abolishing Slavery . . .'. It is as well to be reminded that non-justiciability is not solely an international phenomenon. The conclusion which Professor Katz draws is that, in the international sphere, while we should strive to maximize the use of adjudication 'in accordance with its nature, we must take care not to dissipate the precious resource by wishful misapplications'.

Chapter 3 is devoted to a consideration of the problem of disputes between non-self-governing peoples and established States, although it begins with a discussion of the question whether the words of Article 5 of the North Atlantic Treaty imply a legal obligation or not. Professor Katz concludes that these words do not express a

<sup>1</sup> *United States v. Texas*, 143 U.S. 621. This was a boundary dispute. However, it was decided in *Kansas v. United States*, 204 U.S. 331 (1906), and confirmed in *Hawaii v. Gordon*, 373 U.S. 57 (1963), that while consent by a State to a suit against it by the United States was given when such State was admitted into the Union, 'It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion'.

contractual obligation in the strict legal sense, although they do express an obligation. 'The obligation', he says, 'is diplomatic, reinforced by what I call a sense of law.' This seems a reasonable way of putting it, but it does not throw much light on the subject-matter of the chapter. Indeed the chapter as a whole is disappointing and Professor Katz fails to come to any firm conclusion. It seems to this reviewer that he does not address himself sufficiently to the real problem. 'Disputes (so-called) between non-self-governing peoples and established States' are not truly international disputes at all. In so far as there are international disputes in this arena, they are differences between the colonial Powers on the one hand and an international organization (principally, the General Assembly) on the other hand. A question worth considering might be whether a forum should be provided for adjudicating such disputes, or indeed whether such disputes are justiciable at all. The alternative possibility of endeavouring to settle these differences by means of representative suits brought by individual Members of the United Nations against the Administering Authority concerned was of course tried out in the *South West Africa* cases, the subject of Professor Katz's fourth chapter.

The author's analysis of these much-discussed cases is particularly interesting. He likens the action started by Ethiopia and Liberia against South Africa to a suit brought by a member of the public to enforce a charitable trust. Such a suit will fail unless the member of the public can show a special interest, i.e. something more than the benefit accruing to the members of the public in general. But for the restrictive provision of Article 34 of the Statute of the International Court of Justice, such a suit might have been brought by the United Nations itself, rather as the Attorney-General may sue in a trust case. The dissenting judgment of Sir Percy Spender and Sir Gerald Fitzmaurice in 1962 is compared by Professor Katz to a decision of the Supreme Court of the United States to decline jurisdiction on the well-recognized ground that the questions raised on the merits were 'political questions', whilst the contrary opinion of Judge Jessup is seen as being in the tradition of Chief Justice Marshall.<sup>1</sup> Professor Katz permits himself the following comment: 'As the justices of the Supreme Court must be mindful of the place of the Court in the general scheme of government of the United States, so the judges of the International Court of Justice should be alive to the functions of the Court within the United Nations system.' From this we may infer that the International Court should be generally progressive, especially when it is a question of implementing the principles of the United Nations Charter. It is, however, impossible to extract from this statement any firm conclusion as to the boundary between justiciable and non-justiciable disputes.

In the ensuing chapter Professor Katz considers the political aspects of the South West Africa controversy, particularly resolution 2145 (XXI) in which the General Assembly purported to revoke the Mandate for South West Africa and resolution 2248 (S. V) in which it established its own Council and Commissioner for South West Africa. Addressing himself to the problem of the legal validity of General Assembly resolutions of this type, Professor Katz considers that the criterion to be applied is 'the process by which each delegate arrived at his vote'. Thus, 'in the degree to which any delegate's vote might reflect partisan political jockeying, or a personal or national political preference, convenience, or whim, its probative value would be dissipated'. Professor Katz relates this test to the familiar problem of trying to identify *opinio juris*

<sup>1</sup> e.g. *McCulloch v. Maryland*, 4 Wheat. 316 (1819): 'We must never forget that it is a constitution we are expounding . . . a constitution intended to endure for ages to come, and, consequently to be adapted to the various crises of human affairs.'



when it is a question of assessing whether a rule of customary law has come into existence or not. Judged by this test he considers that 'a foundation in law for the authority of the General Assembly to cancel the mandate has not yet been established'. In an interesting epilogue, which draws to a considerable extent from the experience of the Supreme Court of the United States in 'civil rights' cases, he proceeds to discuss the alternative ways in which the International Court of Justice might have handled the *South West Africa* cases had it felt inclined to overcome the inhibitions which prevented it from adjudicating in those cases.

In his final chapter Professor Katz asserts that while disputes of the South West Africa type are 'ultimately amenable' to adjudication, disputes of the Cold War type are not. The difference, according to him, is that in the former type of case 'the principles and standards available to be applied in an effort to adjudicate' have already been laid down (e.g. in the Mandates and trusteeship agreements, in Article 22 of the Covenant and in Chapters XI, XII and XIII of the Charter). By contrast, in the case of Cold War disputes, 'the principles and standards purportedly available as a guide to peaceful settlement boil down to the objective of peaceful settlement itself'—and that is an insufficient basis for adjudication. In a postscript Professor Katz regrets the low standard of recent debates in the United Nations and expresses the wish that the participants in these debates would do more to emulate the much higher standards of the late Dag Hammarskjöld.

To sum up, this is a thoughtful and stimulating book. It is a pity, though, that the author devotes his attention almost entirely to disputes of the Cold War and colonial type. It would have been interesting to hear his views on why there is such comparatively little adjudication even of disputes of a much more ordinary genre, such as boundary controversies and differences of opinion about harsh treatment of aliens, nationalization of foreign enterprises, imposition of import surcharges and the like.

D. H. N. JOHNSON

*International Group Protection: Aims and Methods in Human Rights.* By J. J. LADOR-LEDERER. Leyden: A. W. Sijthoff, 1968. 481 pp. D. Fl. 52.

Dr. Lador-Lederer offers a new solution to an ever-present problem, largely neglected since the efforts of the League of Nations during the inter-war period, namely the protection of group rights. In selecting this approach to human rights, rather than the protection of the private individual against States, he faces the difficulty of isolating his peculiar interest from interconnected topics. Even so, he succeeds in setting up a structure for the purpose of analysis:

However, one must consider the vast groups still living in the shadows of the past, in slavery, under colonialism or various forms of hetero-ethnic domination—indigenous populations, populations under mandates, trusteeship or *Apartheid*, minorities and scattered communities. There are economic groups in need of protection (labour, consumers) as well as groups emerging from transitory political situations (Prisoners-of-War, populations under occupation, refugees, stateless persons, etc.). If an analysis is made of the legal regime under which these groups live, and if this analysis is taken to its logical conclusions, it will be seen that even within the range of international law based on a State monopoly of nationality, there is much material on group interest (such as of religious communities), the international protection of which was obviously based on something other than a nationality link. (p. 43.)

The book does not concentrate on any particular group or specialized field; on the contrary, an attempt is made to include all 'entities' in need of additional protection (pp. 95 et seq.). From this context of group rights, 'the writer envisaged his subject as a phenomenon of social interaction, one part of which relationship is the complex Individual/Group, the other part the complex State/International Society, but both having ancillary and intermediary bodies: associations, agencies, tribunals, etc.' (p. 451). The 'etc.' constitutes the thrust of the work, i.e. those groups that must be accorded legal status. Although stressing the normative effect, the author looks beyond positive international law, which he believes, with considerable justification, is incapable of guaranteeing human rights and moves toward natural law concepts in order to reach what he designates as humanitarian law.

The premise open to further consideration is confronted at the outset: what constitutes a group (or minority) in the political and legal realms? Assuming such entity can be designated in a generic and legal sense, is there a need for additional guarantees (pp. 21-3)? Conversely, can it be argued that specially preserved group rights are unnecessary if private individuals are given adequate protection by municipal and international law? This book would not necessarily provide an unqualified answer; for in some cases, notably prisoners of war, racial and religious minorities, and linguistic entities, additional safeguards of the type not accorded to every individual may be desirable.

Aside from these clear examples, an enormous number of entities is included within the study. In fact, so numerous are the listings that a full review is impracticable. The author goes so far as to devote considerable attention to related problems such as colonialism and *apartheid*, and the condition of indigenous populations, which interest results in an exhaustive examination not only of traditional human rights but also of such closely related matters as the right to education, asylum, travel, and association. Indeed, the notion of discrimination in general becomes the book's underlying theme; consequently, its content goes far beyond the type normally included within a book entitled *International Group Protection*. Nevertheless, the author is to be congratulated on including a number of subjects directly applicable to oppressed peoples, thereby not treating the subject too narrowly. Accordingly, this reviewer is in sympathy with the book's aim, the quest for additional protection, notwithstanding the fact that it can be argued that in numerous instances the topics might be more appropriately related to guarantees of individual human rights. It was unavoidable that choices as to classification were necessary to enable the inclusion of many diverse areas. At the very least, a new approach has been attempted; moreover, considerable insight into a series of urgent problems has been provided. Whether refugees, sick and wounded prisoners of war, Jews in the Soviet Union, or indigenous populations of southern Africa are classified as individuals or groups is not of primary significance. The important consideration is that they be accorded international protection. This message emerges forcefully from the book. The interdependence, indeed even merger, of these two solutions is clearly recognized (p. 221).

The framework of inquiry emerges from the five chapter headings. Chapter I, 'The Addressees of the [Humanitarian] Law: the Obligatee', sets forth the duty of the sovereign State and state entities, as they deal with their own nationals and aliens. From the criterion of the duty imposed on States and multinational organizations, Chapter II, 'The Law: Order and Protection through Consent', is primarily concerned with an analysis of applicable treaty norms. The third chapter, 'The Law: Order and Protection through Authority', comes to grips with the Law's application by multinational organs, deemed capable of implementing substantive provisions. The two

final chapters, representing the major portion of the text, are devoted to the addressees of the law—the beneficiaries and those agents affording the desired recognition and protection. The author's main proposal is that individuals and groups be treated as beneficiaries of humanitarian law, and likewise of positive international law, not full procedural subjects. Significantly, the notion of the individual as a subject of international law, possessing the right of petition or *locus standi* before multinational commissions and tribunals is rejected as impracticable, on the theory that individuals are not in a position to safeguard group interests (p. 246). Accordingly, the United Nations and its human rights programme are held to be theoretical and academic, since such rights cannot be effectively incorporated into municipal law (p. 202). An example can be seen in the inability to implement the Genocide Convention (p. 360). The proposed solution is the use of disinterested and impartial inter-governmental organizations, such as the I.L.O. and E.C.O.S.O.C., plus non-governmental institutions, particularly the I.C.R.C. In this regard it is argued that sovereign States which have a direct interest in a controversy are incapable of affording impartial representation to a group or minority. Perhaps the World War I Minorities Treaties are at the basis of this reaction; their failure haunts the present undertaking.

The prime example of the success of a beneficiary-agent relationship can be seen in the practices of the European Commission of Human Rights, wherein private petitions are impartially examined and findings of fact rendered prior to action before the European Court of Human Rights or the Committee of Ministers—the Council's independent agents of protection. Admittedly, the European Commission of Human Rights represents the unique illustration of the type of regime sought; however, analogies are also drawn from the prior practices of the I.L.O., I.C.R.C., and the High Commissioner for Refugees:

[O]nly Agents of Protection, not parties to the machinery known as Order through Consent can be 'above the parties to the conflict'. They are protectors of the law by their protecting specific victims. They are, thus, a most important source of the law and their espousal of a case, particularly one within the competence of the European Human Rights Commission, already goes far beyond advocacy and is tantamount to a judgment on the equity of the case, pending the Court's pronouncement of the applicability of a statute. . . . [T]he function of Agents of Protection is not only to prosecute illegalities, but also, if this is part of their terms of reference, to redress injustice, ahead of the establishment of legislation for this purpose (p. 247).

This book, by seeking new approaches to the protection of groups, and those individuals contained therein, makes a significant contribution to human rights literature. No attempt has been made to gloss over difficult issues; further, an enlightened viewpoint is taken toward minority safeguards. Dr. Lador-Lederer's proposals will be extremely valuable provided group protection is conceived as one phase of the larger problem of regional and global human rights, rather than the only alternative to traditional diplomatic protection or undertakings seeking to deal with individuals directly. All of these solutions, which he has critically and ably reviewed, have some value in appropriate situations, as can be seen from the numerous examples of prior practices set forth in the book; therefore they should be deemed to constitute alternatives.

W. PAUL GORMLEY



*Jerusalem and the Holy Places.* By ELIHU LAUTERPACHT. London: The Anglo-Israel Association, 1968. 87 pp. 10s.

In this pamphlet Mr. Lauterpacht traces the history of the devolution of sovereignty over Palestine, and in particular Jerusalem. He reaches the conclusion that neither Egypt nor Jordan was entitled to claim sovereignty over those parts of Palestine which they occupied before the 1967 conflict—the Gaza Strip and the West Bank of the Jordan (including the Old City of Jerusalem). Consequently, Israel, by virtue of its present occupation of those areas, is entitled to claim sovereignty over them, and, in particular, to annex the Old City of Jerusalem. Mr. Lauterpacht then goes on to offer, on this assumption, a draft Declaration and Statute to establish a special regime for the Holy Places in and around Jerusalem.

This analysis may be summarized briefly. Ottoman rule in Palestine ended *de facto* in Palestine in 1917 and was replaced by British military occupation. By the Treaty of Lausanne (1923) Turkey confirmed the transfer of sovereignty to the Principal Allied and Associated Powers. In the meantime, the Powers had in effect vested their rights in the League of Nations, to be exercised in fulfilment of the objects of the Mandates system. Although the location of sovereignty over Palestine during the Mandate is 'difficult to specify', all the relevant attributes 'including the right to dispose of territory, could be exercised only with the consent of the Council of the League' (p. 38). On the dissolution of the League, Mr. Lauterpacht concludes on the basis of the I.C.J. advisory opinion on the *International Status of South West Africa* that 'at least part of the League's interest in the sovereignty previously vested in it and the Mandatory had, as a result of the events of 1945-6, devolved upon the U.N.' (p. 38). In 1947 the United Nations General Assembly passed a resolution (181 (II)) taking note 'of the declaration by the Mandatory Power that it plans to complete its evacuation of Palestine by 1 August, 1948' and recommending a plan for the partition of Palestine into independent Arab and Jewish States with a special international regime for the City of Jerusalem, and economic union. This plan was accepted by the Jews and rejected by both the Arab population of Palestine and by the Arab States. The effect of this resolution on sovereignty over Palestine was, in Mr. Lauterpacht's view, that the United Kingdom, having been relieved of the obligations of the Mandate, 'completely dropped out of the picture' (p. 38). As for the residual rights (such as they may have been) of the U.N., Mr. Lauterpacht examines the possibility that they were conveyed to the proposed Arab and Jewish States respectively under the partition resolution, apart from its interest in the area of the proposed international City of Jerusalem. He concludes, however, that this is not supported by the terms of the resolution, subsequent events and subsequent attitudes of the U.N. In his view the most realistic theory is that on the termination of the Mandate there arose 'a lapse in or vacancy of sovereignty'. By this he does not mean to imply that Palestine became a *terra nullius*: this status was excluded by the partition resolution. Rather, 'sovereignty could only be acquired by lawful action' (p. 42) and, correlatively, *ex injuria ius non oritur*.

Mr. Lauterpacht then examines the lawfulness of the subsequent acts of Israel and the neighbouring Arab States in Palestine. In his view, the entry of the Arab States into Palestine 'was entirely unlawful': it was in breach of Article 2 (4) of the Charter since it was directed against the 'territorial integrity' of a *de facto* State, Israel. In consequence, the maxim *ex injuria ius non oritur* applied so that 'no Arab State could rely upon its physical occupation of any part of Palestine as a valid foundation for filling the sovereignty vacuum' (p. 44). Thus Jordan could not acquire sovereignty over the

areas west of the Jordan—including the Old City of Jerusalem—nor Egypt over the Gaza Strip.

On the other hand 'Israel when attacked became entitled to defend herself' (p. 44) and also all Jewish settlements in the whole of Palestine, including Jerusalem: 'The defensive measures adopted by the Israeli forces could not be limited to the area allocated to Israel in the Partition Plan' (p. 45). Consequently, Israel was entitled to fill the 'sovereignty vacuum' in the areas occupied outside the partition resolution boundaries—including the New City of Jerusalem.

In Mr. Lauterpacht's view, 'questions of sovereignty are quite independent of the Armistice Agreements' which confer only 'temporary rights of occupation' (p. 45). 'Therefore breach of the Armistice Agreements in 1967 by Jordan entitled Israel to fill the vacuum of sovereignty in Jerusalem—and presumably, on the same argument, in the whole of the West Bank of the Jordan and in the Gaza Strip also.

This analysis is clearly controversial and open to criticism. In his exposition of the facts, Mr. Lauterpacht is sometimes disingenuous. For example, discussing the relationship of the principle of self-determination to the terms of the partition resolution, he refers to 'the manifest fact that even by 1947 the country was clearly separable into Jewish and Arab areas', and that consequently the partition resolution, 'far from being a denial of the right of self-determination, was in fact a direct application of the principle. The Jews were not to determine the future of the Arabs, nor were the Arabs to determine the future of the Jews. Each group was to determine its own future' (p. 18). This is not borne out by the U.N.S.C.O.P. Report which recommended partition. In the whole of Palestine west of the Jordan, Jews formed at that date an estimated one-third of the population (estimated population in 1946: Arabs 1,203,000; Jews: 608,000; others 35,000). The U.N.S.C.O.P. Report, analysing the population according to areas, estimated the proportion of Jews as ranging from under 5 per cent to over 40 per cent (in the Jaffa-Tel-Aviv, Haifa and Jerusalem areas). In the Jewish State as recommended by U.N.S.C.O.P., Jews would have formed a bare majority of the permanent population (on the 1946 figures: 498,000 Jews, 407,000 Arabs, plus a seasonal migrant population of 90,000 Bedouin). In the proposed internationalized area of Jerusalem, there were an estimated 100,000 Jews and 105,000 Arabs. In the Arab State, there would have been a minority of 10,000 Jews. In the partition plan recommended by the General Assembly, the number of Arabs in the Jewish State was reduced, no doubt, by the exclusion of the Arab town of Jaffa (population 70,000). But, however desirable the creation of a Jewish State in Palestine, it cannot be described as a clear-cut application of the principle of self-determination. Indeed, the U.N.S.C.O.P. Report recognized this fact in relation to the whole concept behind the Mandate, in noting:

With regard to the principle of self-determination, although international recognition was extended to this principle at the end of the First World War and it was adhered to with regard to the other Arab territories, at the time of the creation of 'A' Mandates, it was not applied to Palestine obviously because of the intention to make possible the creation of the Jewish National Home there. Actually, it may well be said that the Jewish National Home and the *sui generis* Mandate for Palestine run counter to that principle. (A/364, paragraph 176.)

Mr. Lauterpacht's views on the effects of the partition resolution are ambivalent and, indeed, he never gets to grips with its import. Although he concedes that 'the General Assembly was not able by resolution to dispose in a binding manner of the whole or any part of the territory of Palestine' (p. 16), he also takes the view that 'it



represented a mark of international approbation of the creation of the new [Jewish] State which, while not legally essential, is not legally irrelevant' (p. 19). He does not make clear its precise legal relevance; but he does rely on it (a) to exclude the status of *terra nullius* for Palestine, (b) to establish boundaries of the State of Israel for the purpose of Article 2 (4) ('territorial integrity') of the Charter (although he also takes the view that 'the boundaries therein laid down . . . have no permanent legal force . . . As a description of a particular boundary they became worthless' (pp. 20-1)). It may be suggested that the only legal effect of the partition resolution of itself (apart from the consequences which might have flowed from its *acceptance* by both Jews and Arabs, which would surely have rested on a consensual basis rather than on the authority of the General Assembly) was to indicate concurrence with the termination of the Mandate (if that was really legally necessary: the terms of the resolution—'Takes note of the declaration by the Mandatory Power that it plans to complete the evacuation of Palestine by 1 August 1948 . . . '—do not indicate that the General Assembly thought so). In the light of subsequent events, its recommendation of partition was less definitive. Thus, the same resolution requested the Security Council's assistance in the implementation of the plan. The Mandatory Power had already stated that it would not enforce any solution not acceptable to both Jews and Arabs, and the Security Council as a whole declined to implement a plan which could only be effected by force. Other plans were put forward: the Arab States proposed a federation on a cantonal basis (a solution first put forward as a minority proposal in the Royal Commission Report of 1937); the United States proposed trusteeship. On 14 May 1948 the General Assembly effectively buried the partition resolution by passing a resolution (186 (S-2)) which relieved the Palestine Commission from the further exercise of responsibilities under the partition resolution and provided for the appointment of a mediator to, *inter alia*, 'promote a peaceful adjustment of the future situation of Palestine'. That these efforts were unsuccessful followed from the incompatibility of establishing a viable Jewish State with room for the high rate of immigration desired by the Jewish Agency, with self-determination for the overwhelming majority of the population of Palestine at that time. Although the boundaries described in the partition resolution were subsequently revived in the Lausanne Protocol (12 May 1949) as a basis of discussion with the Conciliation Commission, the subsequent approach of the United Nations was to endow the armistice lines with the status of more or less permanent and recognized boundaries. Thus, the resolutions of 1956-7 all emphasize the requirement of withdrawal to the lines defined in the Armistice Agreements.

On the devolution of sovereignty in Palestine, Mr. Lauterpacht's arguments are ingenious but unconvincing. The nub of his argument—that the Arab States did not and could not acquire sovereignty—depends on the assertion that their use of force in Palestine was unlawful. But this is very doubtful, at least on the grounds which he puts forward. It is not easy to characterize the action of the Arab States as a clear breach of Article 2 (4)—even accepting for the sake of argument that this embodied at that date a customary rule applicable to non-members of the U.N.—in the factual context in Palestine at that date. The State of Israel was proclaimed after years of, and in the midst of, three-cornered fighting between Jews, the Mandatory and the Arabs. The population figures and distribution in Palestine have been pointed out above. Intervention took place at the request of the Arab Higher Committee (which represented the Arab population of Palestine) and within a day of the proclamation of the State of Israel. It is difficult to regard that State as having even *de facto* existence by satisfying the traditional requirements of Statehood within any extended area at that time. It has been pointed out above (and conceded by Mr. Lauterpacht) that the



partition resolution cannot be regarded as having any dispositive effect in establishing defined boundaries. The entry of the Arab armies was never condemned by the U.N. as either a breach of Article 2 (4), 'aggression' or a violation of the partition resolution. In this context it is perhaps significant that the questionnaire (S/753) addressed by the Security Council to the Arab States inquired, not whether their armies were operating in the area allotted to the Jewish State, but whether they were operating 'in areas . . . where the Jews are in the majority'; it was also asked whether 'the Arabs of Palestine requested assistance'.

Even if this intervention were correctly described as 'unlawful', it does not follow that Arab States in effective possession of territory at the end of hostilities could not acquire title. The only authority which Mr. Lauterpacht offers for this assertion is the maxim *ex injuria ius non oritur*. But maxims rarely provide sound theoretical support: there is surely equal consensus in favour of the maxim *ex factis ius oritur*. In any case, even were it accepted that no Arab State could acquire title to territory allotted to the Jewish State by the partition resolution (which is very doubtful), this prohibition could not reasonably be extended to the territory allotted to the Arab State. Here there was presumably no *injuria*. Even if the original occupation was 'unlawful', it might be validated subsequently by other means. Thus, under the Armistice Agreements Jordan and Egypt (as was Israel) were left in lawful possession of the territory of Palestine by contractual agreements brought about by U.N. mediation and under U.N. auspices and repeatedly affirmed by the U.N. Jordan annexed the West Bank after a popular referendum—surely an exercise of self-determination by the population. The disapproval of the Arab League of this action, to which Mr. Lauterpacht refers, was against creating a *de jure* as well as *de facto* partitioned Palestine, contrary to the Arab League policy of a united, independent Palestine. Furthermore, Jordan was admitted to the U.N. in 1955 and no reservations as to its boundaries were expressed. Jordan was in undisputed possession of the West Bank for nearly twenty years. There is really no serious doubt that Jordan validly acquired sovereignty over the West Bank. This may not be true of Jerusalem; if not, the only defect in title—and this may today sometimes assume great importance—was lack of international recognition. And this has been a defect in Israel's title to Jerusalem also. It may be noted that the position of the Gaza Strip is rather different: Egypt apparently never claimed sovereignty there, following the policy of the Arab League.

As to whether Israel may acquire sovereignty over the areas of Palestine occupied since 1967, it may be suggested that it is not very useful to discuss this in terms of filling a 'sovereignty vacuum' (a concept depressingly reminiscent of the 'occupation' by colonizing powers of 'native' territories not organized as 'States'). The legal and factual situation is that while the Armistice Agreements were to some extent respected, they protected the possession of Palestine by all parties. If they are no longer in force, it is still not necessary to make abstract determinations of 'sovereignty' over particular areas of Palestine to decide whether they are or are not open to acquisition by Israel. Under the traditional law, the acquisition of territory under the sovereignty of another State was admitted both by force ('conquest') and peacefully ('prescription'). The presently more fashionable concepts of acquiescence, consolidation, preclusion and recognition can have a similar effect. Clearly, at some date and by some means, Israel *may* acquire sovereignty over the occupied areas. The only problem is, whether the possibility of acquiring sovereignty is temporarily inhibited by any prohibition of international law. There is, of course, the traditional rule, arising no doubt from its doubtful effectiveness and impermanence, that territory cannot be annexed *pendente bello*. Mr. Lauterpacht seems to imply that this does not apply to

occupied territory not under the sovereignty of its original occupant. There is the well-established modern rule that title cannot be acquired as a result of the unlawful use of force (although this is no bar to subsequent valid acquisition by other 'modes'). The response of members of the United Nations to the Israel occupation—in debates in the General Assembly and Security Council, and in statements and resolutions all of which, whether or not they condemn Israel's action as 'aggression' emphasize the need for 'withdrawal'—has demonstrated a virtually unanimous *opinio juris* in favour of a broader prohibition of conquest of territory by force, whether in 'aggression' or in 'self-defence'. Mr. Lauterpacht treats this remarkably unanimous evidence of State practice very cavalierly. Although he reasonably points out that it would prohibit the forcible restoration of a lawful, but unlawfully dispossessed sovereign, this objection only suggests the need for a possible exception (although the interests of stability and order might indicate otherwise); it has no conceivable application to the situation in Palestine (apart from the extreme view put forward by some Zionists that the Mandate gave them a right to the whole of Palestine—including Transjordan!). He also notes that action in self-defence may properly involve action within the territory of the 'aggressor' State. This may be conceded; but it has no bearing on whether title to territory can be acquired by that action. At some point 'self-defence' must reach its limits, and the traditional concept of 'proportionality' implies limits not only to the measures which may be taken, but to the rights which can thereby be acquired. It cannot seriously be maintained that a minor frontier *mêlée* can entail loss of sovereignty over territory.

Other reasons for limitation of the right to acquire territory by force, however justified its initial use, can be suggested. One may instance the need for stable boundaries, and the principle or right of self-determination. Clearly, the transference of territory by conquest contrary to the will of its inhabitants runs counter to both considerations. In this connection, Mr. Lauterpacht's arguments betray a somewhat out-of-date concept of territory as simply 'property'. If the submission of territorial changes to plebiscite has been a notable feature of international relations since the First World War, it would hardly be surprising if the principle of self-determination has shown itself also in a prohibition of the transfer of territory by force contrary to the wishes of its inhabitants. It is hardly worth pointing out that the majority of the Arab inhabitants of the Israeli occupied areas would be unlikely to opt for Israeli rule.

A. L. W. MUNKMAN

*Studies in the Law of Naval Warfare: Submarines in General and Limited Wars.* By W. T. MALLISON. International Law Studies, 1966 (U.S. Naval War College). Washington: United States Government Printing Office, 1968. xv+230 pp. \$1.75.

Professor Mallison of the George Washington University National Law Center has contributed the fifty-eighth volume in the series of International Law Studies which have emanated from the Naval War College, Newport, R.I. He has set out to make good a controversial contention in an area of the Law of Naval Warfare which is of considerable juridical importance as well as of contemporary relevance. He has taken a new and refreshing look at prevailing legal assumptions about the use of the submarine arm in both World Wars. The general trend of his conclusions is that he is by no means convinced that the use of this form of naval warfare by the Germans stands



under the condemnation of illegality. His arguments are closely reasoned and stimulating even if they may not command general support among jurists. Contemporary legal writers are not likely to dissent from his disenchantment with that part of the Judgment of the International Military Tribunal of Nuremberg which dealt with 'unrestricted submarine warfare' and the criminal responsibility of Admiral Doenitz for that activity. Where the work may be exposed to some criticism is in slightly dogmatic analyses of the naval happenings in the two World Wars. This is a work short in compass and it is not very easy to deal briefly and justly with the many and complex ramifications of fact that make up the naval history of those two major conflicts. In particular, the precise sequence of events, whether they be Admiralty Orders, or specific sinkings of ships, is not given that careful attention and exposition essential for a jurist mounting cogent legal arguments based upon the operation of reprisals. True it is that in the whole of the law of war it is hard to find an area in which the device of reprisals has played a more decisive role, not only in controlling the actual naval war practices of belligerents but in helping to shape, inform and develop the law of naval warfare of our own time.

Relying upon the structure of international law thinking displayed in McDougal and Feliciano's *Law and Minimum World Public Order*, Professor Mallison presents his arguments in support of the legality of modern submarine warfare under the headings of four principal 'claims'.

The four 'claims' areas selected by the author are (i) the combatant status of the submarine; (ii) the submarine operational area and its use in the last two major wars; (iii) the objects and methods of belligerent attack by submarines; and (iv) the weapons used and to be used by submarines in belligerent attack (pp. 10-12).

Considerable space is devoted to establishing the lawful combatant status of submarines as warships and of their crews, a matter which might be thought to have little more than historical interest today (pp. 29-53). The London Naval Treaty of 1930, Article 22, preserved in the Protocol of 1936, does not leave much room for argument on that score. It is odd to find no reference to Article 8 of the Geneva Convention of the High Seas, 1958, for an authoritative and codifying definition of 'a warship', a definition in turn taken from Hague Convention VIII, relative to the Conversion of Merchant-Ships into Warships, 1907. There seems to be a confusion between the legal status of the crew of submarines when captured and the combatant status of the submarine itself. Also, the author equates combatant status with entitlement to prisoner-of-war status upon capture (p. 10). Article 3 of the Hague Regulations 1907 makes it clear that 'the armed forces of the belligerents may consist of combatants and non-combatants. In the case of capture by the enemy both have the right to be treated as prisoners of war.' The Geneva Prisoners of War Conventions, 1949, in Article 4, makes it no less clear that certain non-combatants, e.g. 'war correspondents and supply contractors', enjoy prisoner-of-war status thereunder.

Professor Mallison is convinced, on his reading of the naval history of the two World Wars, that the German establishment of 'operational areas' was a valid exercise of reprisal in response to previous British activities at sea. Among these latter he instances the earlier establishment of the like operational areas, the arming of merchant ships accompanied by orders for them to initiate attack upon German submarines, and the enforcement of the 'hunger blockade' (p. 66), sometimes called the 'long-range blockade'. There is a disappointing lack of any attempt to advance any legal arguments for the validity of the latter. There is also disconcerting acceptance of certain matters as firm facts when the evidence put in support is frail. Thus, to substantiate the German allegation that the British Admiralty ordered merchant



ships to initiate attack upon German submarines in the First World War he cites the incident of the British merchantman, the *Woodfield*. The order, supposedly captured by the Germans on the *Woodfield* and transmitted to the U.S. State Department through the U.S. ambassador in Berlin, stated: 'If a submarine is obviously pursuing a ship by day and it is evident to the master that she has hostile intentions, the ship pursued should open fire in self-defence notwithstanding the submarine may not have committed a definite hostile act, such as firing a gun or torpedo.' This piece of evidence is used to substantiate the following statement (p. 66): 'The U.K. armed its merchant ships and issued instructions that they were to open fire upon German submarines. These actions could be regarded as violations of the traditional law which only permits [*sic*] duly commissioned naval vessels to initiate attack.' The doubtful nature of the conclusion is equalled only by the nature of the evidence. It is not to the point that later (p. 110), when referring to the instructions found on the *Woodfield*, the author states: 'These instructions, *in the German view* [*italics inserted*] provided conclusive evidence of the illegal methods of warfare employed by British armed merchantmen'.

Professor Mallison mounts his arguments on the basis that once a merchantman is armed it is integrated into the naval forces of the belligerent and stands quite unprotected by the Protocol of 1936 to the London Naval Treaty of 1930. He likewise considers that the establishment by the Germans of 'operational zones' in which all merchant ships, enemy or neutral, should be sunk on sight without warning was a lawful activity because of (i) the British long-range blockade, (ii) the neutrals' acquiescence in it, (iii) the arming of British merchantmen, and (iv) the previous establishment of mined areas by the British. He does not seem prepared to accept that the German system of loose mining, with unmoored mines, or the German early resort to instant sinkings of merchantmen, apart from other activities of dubious legality, have any relevance to the arming of British merchantmen, and the imposition of the 'long-range' blockade. As to the latter, he does not seem prepared to mention any arguments in favour of its legality, even if solely for the purpose of demolishing them. On p. 130 he makes the statement: 'Whether particular neutral merchant ships obtained ships warrants because of coercion or because of a desire to co-operate, they were effectively integrated into the British and Allied war effort.' That statement is not by any means beyond dispute. His conclusion is in like position.—'It is difficult to find any sound reason why neutral ships so integrated should not be subject to the same procedure of attack, including sinking without warning, to which enemy merchant ships may be subjected lawfully.' These two sentences express better than any other extract the central thesis of this book. It must be left to the reader how convincing he finds them.

It seems curious that although the author makes some references to the Geneva Conventions of 1949, he fails to refer to Article 35 of the Geneva (Maritime) Convention in the context of his observations (p. 120): '. . . the judicial criteria to determine whether or not a merchant vessel is participating in the war or hostilities in a way which results in losing "the immunities of a merchant vessel" should be determined by the fact of such participation and not by the particular method of such participation.' Article 35 of the Convention cited provides: 'The following conditions shall not be considered as depriving hospital ships or sick-bays of vessels of the protection due to them: (1) the fact that the crews of ships or sick-bays are armed for the maintenance of order, for their own defence or that of the sick and wounded.' According to Professor Mallison the arming of British merchantmen and the Admiralty authority to use those arms for self defence, means that virtually all British merchant ships were to be

assimilated to warships for the purposes of instant attack without warning by every submarine. The principle for which he contends seems to find no place in one Convention governing the law of naval warfare and now binding 122 States.

His chapter (V) on submarine weapons seems more balanced. On the topic of nuclear weaponry and submarines he seeks to make a proper balance between the demands of military effectiveness and those of humanity. He does not, however, relate the Hague Convention No. IX on Naval Bombardment (1907) to the use of the 'Polaris' missiles (probably superseded now by 'Poseidon') launched from submarines and directed against land targets.

Much that the author has to say about the law and practice of submarine warfare is helpful and needs to be said. The combination of the submarine and the nuclear missile is probably the most effective method of destruction yet invented. It is at this precise stage in the development of weaponry that the balanced juxtaposition between military and humanitarian needs must be formulated with skill, precision and integrity by the jurist of today.

G. I. A. D. DRAPER

*Identity and Continuity of States in Public International Law*. 2nd edition. By KRYSZYNA MAREK. Geneva: Librairie Droz, 1968. 619 pp. No price stated.

This useful monograph was reviewed in its first edition in this *Year Book*, 31 (1954), p. 518. The second edition is virtually a reprint although there is a short *postscript* (at p. 591) and an additional bibliography (at p. 604).

IAN BROWNLIE

*Law and Policy Making for Trade among 'Have' and 'Have-Not' Nations*. By STANLEY D. METZGER. Edited and with a Preface by John Carey. Background Paper and Proceedings of the Eleventh Hammar skjöld Forum, published for the Association of the Bar of the City of New York. Dobbs Ferry, New York: Oceana Publications, 1968. 118 pp. (including bibliography). \$6.

This record of the Eleventh Hammar skjöld Forum of the City of New York Bar Association makes stimulating reading for any lawyer interested in current problems of international trade, particularly trade with developing countries. This is not only because now, when the U.N. Development Decade is drawing towards its close and future policies are under consideration, most problems of these countries still appear unresolved, but also because of the high intellectual level of the three main contributions—by Professor S. D. Metzger, the author of the Working Paper, and Professor R. N. Gardner—both with wide experience of the subject in the U.S. administration—and by Raúl Prebisch, the distinguished former head of the U.N. Conference on Trade and Development and, before, of the U.N. Economic Commission for Latin America. Within a brief compass the book presents, in lively thrust and counterthrust, the essential economic and commercial arguments, often conflicting, which underlie

the norms and recommendations of treaties and resolutions of international agencies on trade with, and between, the developing countries.

The Working Paper is concerned with measures of foreign commercial policy as a means of transfer of resources from developed to developing countries. Commodity agreements, compensatory financing, tariff preferences and regional arrangements are examined in turn. With the exception of compensatory financing schemes, the author's conclusions are negative. Thus, commodity agreements as a method of price *augmentation* (as distinct from price *stabilization*), lead to waste and misuse of available resources. They are a 'throwback to the worst examples of controls in the inter-war period' (p. 19) and, at their best, can be of very limited effect: coffee, cocoa, tea, bananas and tin amounted in 1964 to 12 per cent of exports of developing countries or to 4 per cent if one disregards coffee and tin. Similarly, tariff preferences for manufactured and semi-manufactured goods of developing countries tend to waste resources and to impede economic growth. Moreover, they introduce discrimination between them and aggravate their relations. The U.N.C.T.A.D. idea of a 'non-discriminatory' regime of discrimination in favour of *all* such countries must be considered a 'non-starter' (p. 32) on account of difficulties involved in such negotiation. Again, regional arrangements are a questionable method of 'collective import substitution' (p. 34). Though they promote local industrialization, they are not likely to increase productivity or reduce costs. Their true motivation is often political. Only cynics in the developed countries may support them on the grounds that they are 'cheaper than foreign aid and not nearly so painful as removing their own protection' (p. 35). Taking good years with bad, the purpose of compensatory financing schemes is to protect developing countries from effects of wide fluctuations in their foreign exchange receipts. They contribute to internal and external financial stability and help to meet the constant requirements of economic planning. Above all, they do not interfere with the normal market forces.

These are the views advanced by Professor Metzger in his Working Paper. In the forum proceedings, Mr. Prebisch, emphasizing the ominous growth of the disparity between the exports and the import requirements of developing countries, called *precisely* for measures rejected by Professor Metzger: First, for import substitution by internal production and, to promote this, for the formation of regional common markets which, he thinks, provide adequate competition as a factor of efficiency; and second, for a system of generalized tariff preferences for the developing countries. Admittedly, such a regime is contrary to a legal order of world trade based on the application of the most-favoured-nation principle. But it is justified, on grounds representing a 'new presentation of the fairly old and famous infant-industry argument' (p. 59), as a *provisional* expedient. While the industrial structure of the developing countries is being strengthened what is needed is a 'wise combination of both trade and aid' (p. 61).

In his action programme Professor Gardner, too, is concerned with harmonization between trade and aid. As to *trade*—from which developing countries obtain at least three times as much foreign exchange as from aid—industrialized countries should, phased over the next twenty years, reduce their tariff protection against imports from developing countries to zero. Even greater benefits could result from a dismantlement of non-tariff barriers. Supplementing these policies, tariff preferences by way of advance instalments of concessions agreed within G.A.T.T. should apply in favour of developing countries. Further, development problems and monetary reform should be tackled together. In addition to the new special drawing rights on the I.M.F., a reserve unit should be created in future; national currencies obtained in exchange



should be used for long-term lending to developing countries. He also calls for a greater measure of *self-help* by the developing countries—reduction of defence expenditure; promotion of internal financial stability; greater efficiency of their state industries; efforts to close the growing ‘family planning gap’ (p. 71), etc. Lastly, these countries should be given more *technical aid* and advice on trade promotion and there should be a regular multilateral examination of their development and trade policies.

Thus, both Mr. Prebisch and Professor Gardner advocate policies condemned by Professor Metzger. Perhaps—as the latter suggests in his concluding remarks—the area of real disagreement is not very wide. For, in the first instance, he, too, believes that financial aid and trade measures should go hand in hand. Indeed, he considers the United Nations one per cent target reiterated by Professor Gardner—with 1975, not 1970, as the target date!—as wholly inadequate. Instead of the trade measures Professor Metzger advocates a ‘major assault’ on *internal* protectionism of the developed countries, particularly in the United States where ‘hundreds of millions, if not billions, of dollars’ a year are involved (p. 79) in the growing of cotton, sugar and other food-stuffs which could be provided more economically outside.

The three contributors also agree on the need for fundamental reforms by the developing countries of their economic and social structures. Professor Gardner goes beyond this in what he says on an ‘organizational’ problem—the question of ‘voting machine versus consensus’ (p. 62). Two-third majorities at the United Nations General Assembly and U.N.C.T.A.D. by which they adopt recommendations on economic and commercial policies, may represent—he reminds us—less than one-third of world trade or one-tenth of the population of their membership. Have such recommendations a real chance of implementation?

Under Mr. Prebisch’s leadership U.N.C.T.A.D. has worked out a procedure designed to substitute conciliation for voting on unresolved questions. So far, its success has been limited. And yet, when Governments come to consider international measures on trade in the sobering atmosphere at the close of the United Nations Development Decade, much depends on their determination to choose between the conflicting arguments of which the book under review gives such an instructive account, by patient negotiation and compromise rather than by voting. For, surely, what matters is not voting but results.

The book is prefaced and carefully edited by John Carey who, as chairman, guided the proceedings of the Forum with erudition, skill and courtesy. Its value is enhanced by a good bibliography prepared by A. P. Grech.

ALEXANDER ELKIN

*Die Völkerrechtspersönlichkeit und die Völkerrechtspraxis der Barbareskenstaaten.* By J. M. MÖSSNER. Berlin: Walter De Gruyter & Co., 1968. 170 pp. DM. 34.

Mr. Mössner’s book on the legal position of the Barbary States in the Law of Nations appears as part and parcel of the wider effort to explore the history of the law of nations outside Europe. The purpose of research in this respect is not only to obtain a better picture of the development of the Family of Nations in the past but also to justify the claim of many present-day States to being classified as ‘original’ States (and

not as 'new' States) and to having to some extent shared in the evolution of our system of international law in the last few centuries. The author has chosen three North African States for discussion: Algeria, Tunisia and Tripoli (Libya). He starts by giving us a summary of North African history prior to the sixteenth century and he examines some of the details of the foundation and development of these States up to the beginning of the nineteenth century. The central facts in this history are the establishment and decline of Ottoman suzerainty and the relations of the three States with some of the European powers which led to trade and treaty-making but also earned them the reputation of piratical entities. What historians used to call piracy was (in the author's view) an integral part of the struggle (*jihad*) which followed the elimination of Islam from the Iberian peninsula in which it had held a dominant position for more than seven centuries.

Part II of the work is devoted to the problem of the status (personality) of the three States in the Law of Nations. The author is at first reluctant to recognize the existence of such personality prior to the nineteenth century (p. 35) but in the light of State practice, he admits its appearance and formulation during the classical period (p. 53). In the discussion of the interconnection of legal personality and recognition, he states that recognition had been of a constitutive nature in the classical law of nations, a view which is not substantiated by the classical writers who in fact never formulated a coherent theory of recognition. Under the sway of the natural law ideology recognition tended to be declaratory in character. Constitutivism seems to have been a positivist invention of the nineteenth century. However, the author's discussion of the natural law impact on the universality of the law of nations and his survey of the views of the classical writers on non-European States is fully convincing and is usefully related to European-North African State practice in the past. The author examines the law applicable to these relations not only from the European but also from the Islamic point of view. After a discussion of the sources of Islamic law and the various schools of thought, he concentrates on the doctrine of *jihad* which meant a continuous state of war between Islam and Christendom. But in actual practice there was room for tolerance for *Dhimmis* (Christians and Jews) within Islamic States. Moreover, legal regulation enabled foreign traders to settle in such States and the institution of *murwada 'ah* made treaty and diplomatic relations with Christian powers a workable proposition. The most interesting part of Mr. Mössner's book is the chapter on the classification of the law of nations into various types such as the system of the integrated European International Law (based on a community of culture and tradition), the coexistential type which appeared between countries of different civilizations (based on ties of trade and treaties) and the universal law of nations based on the natural law doctrine. The author states that relations between North African and European powers were governed by the second type of law, the same which was also applicable to the States participating in the East Indian trade prior to the nineteenth century. It would, however, be a fallacy to exclude from this type of relations the operation of international customary law. Its principles underlie the conclusion of treaties, the working of diplomacy, maritime trade and other activities. This classification is followed by an analysis of the North African treaty material in detail. The author gives a description of the structure and the characteristic features of these treaties and the various legal institutions which are used to settle the relations between the contracting parties. One of the problems is connected with Ottoman suzerainty over Algeria, Tunisia and Tripoli and their simultaneous capacity of exercising rights of external sovereignty independently, a capacity which increased in course of time until their vassalage became nominal. It would be interesting to recall in this respect Professor John

Westlake's comparative analysis of the Holy Roman, Mogul and Ottoman Empires. The author refers to some of the typical provisions in the treaties such as those dealing with cessation of hostilities (peace treaties), maritime affairs, prize law, slavery, ransom, the exercise of the active and passive right of legation, capitulatory and other provisions. Capitulations have been quoted by the positivist writers of the nineteenth century as evidence of the inferior civilization of non-European States and the superiority of European civilization, a view which has no foundation in Asian tradition, and the author's valuable observations will no doubt contribute to a revision of this view. At the end of the book are quotations from the classical writers referring to the Barbary States. Among them Bynkershoek deserves special mention, for he was the first to question the wholesale condemnation of the Barbary States as piratical entities and invited an examination of their role in the Family of Nations on the basis of historical facts, treaties and diplomatic relations with them. There is also a reference to the decisions of Sir William Scott (Lord Stowell) and his positive attitude towards the legal status of these States in the Family of Nations. Mr. Mössner's book is no doubt a valuable and highly interesting contribution to the history of the Law of Nations and particularly to the history of treaty and diplomatic relations between Europe and the world of Islam.

C. H. ALEXANDROWICZ

*The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law.* By E. K. NANTWI. Leyden: A. W. Sijthoff, 1966. xv+209 pp. £1. 15s.

This book is divided into two parts. The first part, 'History and General Principles', is disproportionately long (82 pages), and offers a broad prefatory survey of the history of international adjudication and the well-worn themes of 'The Compatibility of the Concept of Sovereignty with the Submission by Sovereign States of their Disputes to International Adjudication' and 'The Principles of Obligation which Induce States to Comply with Judgements of International Tribunals'. Mr. Nantwi comes to the conclusions that 'the consent of sovereign States is a condition *sine qua non* to the conferment of jurisdiction on any international tribunal' and that 'once a State has given such consent, it cannot then be heard to plead its own sovereignty as absolving it from the obligations ensuing, since the right to enter into international engagements is a fundamental attribute of State sovereignty' (p. 64); in customary international law the basis of the obligatory character of judgments of international tribunals is found in the concepts of *res judicata*, good faith and *pacta sunt servanda*. His views on advisory opinions of the International Court are more controversial. He expresses the view that:

... the habitual and the consistent acceptance by international organs of the Court's advisory opinions has crystallized, or is, at any rate, in the process of crystallization into a customary rule of international judicial system. (p. 73.)

Since this rule does not stem from the principle of *res judicata* the binding force of advisory opinions 'belongs to a class of its own'. It may be suggested that this conclusion is not borne out by the evidence which he offers of the practice of international organs. Nor, even if acceptance of advisory opinions were 'habitual and consistent',



could this acceptance necessarily then be characterized as 'a customary rule', in the sense that failure to accept an opinion could be termed 'unlawful'. Clearly, the opinion of jurists and judicial bodies on matters of customary law or the interpretation of treaties is—even when, as the I.C.J. has been at pains to emphasize, 'only of an advisory character' and with 'no binding force'—of interest and worthy of respect, but their acceptance must depend on their inherent value. Even their habitual acceptance could not sensibly be thought of in terms higher than that of a sort of 'constitutional convention'. Furthermore, the concept of advisory opinions as having any 'binding force' must raise questions (which Mr. Nantwi does not discuss) of the relationship between the international organs requesting an opinion and their individual members. Mr. Nantwi does not examine the suggestion sometimes made (e.g. by Judge Koretsky in the *South West Africa* cases (Second Phase)) that an advisory opinion may be 'binding' on the Court.

The second part of the book, 'Measures of Enforcement', is its core. It begins with a selection of examples of awards and judgments which were initially not accepted by one or both parties or challenged for some reason, giving brief summaries of the cases. A concluding section summarizes the grounds on which nullity of an award has been alleged, but Mr. Nantwi does not go into their merits. The next two chapters survey possible measures of enforcement or bringing influence to bear on a State to comply with an award: individual measures by the successful party—self-help, armed force, economic sanctions, enforcement through the municipal courts, diplomatic measures; collective measures through international organs or organizations—the Security Council, the General Assembly, the I.L.O., I.C.A.O., I.M.F., I.A.E.C., regional institutions (the European Convention for the Peaceful Settlement of Disputes, the European Court of Human Rights, E.C.S.C., and the American Treaty on Pacific Settlement (Pact of Bogotá)). In a concluding chapter on 'Enforcement during Wartime', Mr. Nantwi draws the encouraging conclusion that 'the obligation to comply with the judgements of international tribunals, if unfulfilled and a subsequent war breaks out between the parties, will survive and be enforceable' (p. 185).

On the whole, this book provides a handy survey, but not an exhaustive analysis of the problem. It contains a table of cases, bibliography and index. The latter is inadequate—but in a work of this size and scope that is not a serious defect. The Model Rules on Arbitral Procedure prepared by the International Law Commission are included as an appendix.

A. L. W. MUNKMAN

*Institutions communautaires et institutions nationales dans le développement des Communautés.* By E. NOEL and others. Published by the *Institut de Sociologie de l'Université Libre de Bruxelles*, 1968. 287 pp. 380 FB.

During the academic year 1965–6, lectures were given at the *Institut d'Études Européennes* in the Free University of Brussels by five officials of the European Communities, one ex-President of the European Parliament, one practising advocate, and one university professor, on the parts played respectively by Community institutions and national institutions in the development of the European Communities. The specific topics dealt with were the Committee of Permanent Representatives (E. Noel); the parts played by national Parliaments and the European Parliament in the develop-

ment of the Communities (J. Duvieusart); the representation and influence of economic interests (Jacques Genton); the implementation of the common agricultural policy (G. Olmi); restrictive practices (P.-F. Ryziger discussed the legal aspects and P. Verloren van Themaat discussed the economic aspects); the co-ordination of short-term indicative planning (C. Segre); and the external relations of the E.E.C. (R. J. Dupuy).

The lectures, which are reprinted in this book, are all of a very high standard, and throw a new light on many of the basic problems of the Communities. They contain a great deal of little-known information, but this does not mean that the lecturers were guilty of excessive specialization; on the contrary, they remind the reader time and again that economic, legal and political developments at the Community level reflect similar developments in the member States and in the world as a whole. For instance, the weakness of the European Parliament and the strength of economic pressure groups in the Communities reflect the declining power of Parliamentary institutions and the rising power of economic interests in all Western countries; and the Common Market's agricultural policy is examined against the background of agricultural economics in general, just as the possibility of conflicts between Community rules and national rules about restrictive practices is examined against the background of the general principles regulating the effects of treaties in the laws of the member States. Similarly, the Common Market rules about restrictive practices are examined in the light of a comparative study of the dominant economic policies in each of the member States. The book is a fine example of inter-disciplinary studies, cutting across the boundaries of law, political science and economics—which is, after all, the only realistic way of studying the European Communities.

The constituent treaties of the Communities vested a power of decision in Community organs, instead of leaving everything to be decided by supplementary treaties between the member States, because it was believed that decisions could be taken more easily by Community organs. This is true when the Council of Ministers can decide by majority vote, or when a power of decision is vested in the Commission. But, so long as the unanimity rule applies in the Council of Ministers, reaching agreement in the Council of Ministers can be as difficult as concluding supplementary treaties between the member States. This rigidity is particularly noticeable when it comes to concluding agreements with non-member States or laying down rules concerning agricultural policy; and above all when it comes to altering parts of the agricultural policy which have already been adopted. Thus the E.E.C. did not sign the recent International Sugar Agreement because the Agreement required export quotas, for which no provision is made in the Treaty of Rome, and the result may well prove to be absolute chaos in the world sugar market. The position is aggravated by the gentlemen's agreement of January 1966, which preserved the unanimity rule in several spheres, including agriculture, where the Treaty contemplated a change to qualified majority voting. Signor Olmi, who lectured on the implementation of the common agricultural policy, said little about these problems, which is not surprising, because he is an official of the Communities; like all the Community officials whose lectures are reprinted in this book, he is far more outspoken than a British civil servant would have been, but it would obviously have been suicidal for him to have discussed the merits and demerits of the unanimity principle in 1965–6, at a time when that principle had given rise to an acute dispute between France and the other member States. However, it is strange that a university teacher like Professor Dupuy, who lectured on relations with non-member States, should have exercised a similar self-restraint.

The book is handsomely produced (apart from the accidental reprinting on pp. 257-9 of a passage from pp. 241-3) but has no index.

MICHAEL AKEHURST

*La Succession d'États aux traités, et notes sur la succession entre organisations internationales.* By ANDREA GIUSEPPE MOCHI ONORY. Milan: Dott. A. Giuffrè Editore, 1968. 168 pp. L. 1500.

Despite the breadth of its title, this book is chiefly a study of the effect of the attainment of independence upon treaties. Chapter III, which occupies about half the book, is devoted to this subject, and it consists of a valuable and detailed account of the practice of States which have become independent (most of them, of course, since the Second World War) in relation to both multilateral and bilateral treaties. The summary of these instances of independence on pp. 62-3, with bibliographical notes, is particularly useful for reference purposes.

The author discusses the methods by which newly independent States have sought to deal with the question of succession to treaties, especially the methods of the inheritance agreement and the unilateral declaration. It is interesting to notice that, whereas the parts of the Commonwealth attaining independence normally adopt one of these methods to make their position clear, those new States which were formerly under French sovereignty prefer not to make an explicit statement but to leave the matter to be dealt with by rules of customary international law (although the author clearly has doubts as to the nature and even the existence of such rules). The brevity of the treatment accorded to the position of third States in relation to such methods is disappointing, since this is surely a crucial aspect of succession. But there is an extremely thorough discussion of membership of international organizations on the part of new States and their participation in various multilateral treaties from the Hague Conventions of 1899 and 1907 onwards. The section on bilateral treaties contains a condensed but methodical analysis of State practice by reference to the subject-matter of such treaties. There is some attempt to deal with the vexed question of international servitudes but, apart from the *Right of Passage* case, little assistance on the subject can be gleaned from recent history.

The first two chapters deal in fairly general terms with theories of State succession and with the various methods of change of territorial sovereignty and the principles, if any, applicable to them. This part of the book is somewhat tentative, and it is difficult to discern which of the various doctrines expounded has the author's support. Many instances of State succession are mentioned in the footnotes, but the discussion of them is brief, and the work becomes much more confident and vigorous when the subject of independence is reached. The book ends with a chapter on succession of international organizations. Here, naturally, there are few examples upon which to build a theory, and the author points out that, in the present conditions of international co-operation, succession of one organization to another will only take place on the terms of an express agreement.

Besides those listed on the page of errata, there are a great many printing errors; on p. 94, for instance, there are four errors, of which only two are listed. It is to be regretted that the production of the book does not show the same meticulous care as its authorship.

C. A. HOPKINS



*International Organization and Integration. A Collection of the Texts of Documents relating to the United Nations, its Related Agencies and Regional International Organizations.* Edited by H. F. van Panhuys, L. J. Brinkhorst, H. H. Maas and Mrs. M. van Leeuwen Boomkamp. Deventer: AE. E. Kluwer. Leyden: A. W. Sijthoff, 1968. xxvi+1,141 pp. (1,133 text and 7 pages index). Dfl. 70.

This excellent manual is a new version of the former *United Nations Textbook*, compiled by the Professor Telders Study Group on International Law assisted by Dr. F. M. Baron van Asbeck and Dr. J. H. W. Verzijl. That work, which went into three editions, has been brought up to date and expanded, in part, by the incorporation of documents concerning various regional organizations. In a foreword Judge Jessup observes: 'There is, I believe, no other comparable collection of the fundamental texts which participants in, and students of, international organization need to have at their desks for convenient and immediate consultation.' Over half of the substance of the work is devoted to the United Nations and this part includes selections on special topics such as peace-keeping, disarmament and the right to self-determination. Of particular interest are the sections on economic and social welfare, including the United Nations Development Programme, and the specialized agencies. The remainder of the volume is devoted to regional organizations and especially the European Communities. The collection does not purport to be exhaustive and the selection is generous enough substantially to obviate criticism on the ground of omission. However, the Treaty for East African Co-operation could usefully have been included. The volume is helpfully annotated and a subject index is provided. A mass of valuable material is presented in a relatively economical format.

IAN BROWNLIE

*The Law and Practice of the International Court.* By SHABTAI ROSENNE. Leyden: A. W. Sijthoff, 1965. Vol. 1, xxiii+506 pp.; and vol 2, xi+pp. 507-998 (including appendices and index). £8.

Shabtai Rosenne is both an experienced diplomat and a scholar of enormous industry. His works on the International Court already comprise *The International Court of Justice*, 1957, its companion volume *The Time Factor in the Jurisdiction of the International Court of Justice*, 1960, and *The World Court—What it is and How it works*, 1962 (second revised edition, 1963). It may be wondered why Rosenne should have thought it necessary to write yet another major work entitled *The Law and Practice of the International Court*.

This he explains in his preface. The object of the present book, as of his previous works on the International Court of Justice, is to examine the law governing the Court as an organ for the settlement of international disputes and the Court's practice, with emphasis on the interplay of political and legal factors bearing upon the Court and its role in the modern society of nations. He does not now depart from that approach. He has, however, responded to the 'extraordinarily rich jurisprudence of the Court' since 1957 and the comments of several reviewers; and, in the light of his own experience, he has not simply brought up to date the earlier books, but has entirely rewritten them, taking into account recent case law and the developing practices in the United Nations. It would be an arduous and thankless task to try to disentangle

the new from the old in the present book. Some of the old tree has been pruned away; much has been retained and new material has been grafted on to it.

In his original book on *The International Court of Justice*, Rosenne devoted Part One to the Court as part of the machinery of diplomacy and Part Two to the organization of the Court. In the new book, he devotes Parts One and Two to the same subjects and treats them on similar (but by no means identical) lines at slightly greater length. Part Three of the original work dealt with 'Practice and Procedure' and occupied about 300 pages. It is replaced by three Parts which occupy about 500 pages. They are Part Three on 'Jurisdiction in Contentious Cases', Part Four on 'Contentious Practice and Procedure' and Part Five on 'The Advisory Practice and Procedure'. This expansion is indicative of the growth both in the stature and in the practical value of the work.

In his review of *The International Court of Justice*,<sup>1</sup> Sir Humphrey Waldock suggested that it would take its place alongside 'Hudson' as an authoritative textbook on the Court. It is safe to predict that the new book will not simply take its place beside 'Hudson' and other works on the Court (past and present) such as Hambro's volumes on the case law, but will in fact be the main source of information on the law and practice of the Court for practitioners. Nevertheless, the book has its limitations. It is concerned primarily with matters of practice and procedure, including questions of jurisdiction and competence, and not with international law as applied and expounded by the Court. While Rosenne acknowledges his debt to Sir Gerald Fitzmaurice, he has not as yet followed the analysis of the judgments and opinions of the Court by Fitzmaurice in the series of articles which ended in the 1959 volume of this *Year Book*.<sup>2</sup>

There is no necessity for further explanation of the contents of the five main Parts of the Book, but the introductory Chapter does call for comment. The author has retained the old section on the political and the legal functions in the settlement of disputes. However, for sections on precedents, amendment of the Statute and the future of the Court, he has substituted a comparison of arbitration and judicial settlement and an assessment of the work of the Permanent Court and the International Court of Justice. There is merit in these new sections, but many international lawyers will regret that Rosenne has adhered so closely to his original view as to the function of the Court.

Possibly in response to Waldock's criticism in the review mentioned above, Rosenne has made some modification in the emphasis that he places on the political character of the Court. He now stresses the political nature of the function performed by the Court as an institution as distinct from its performance of that function. This clarification and shift of emphasis are welcome. Nevertheless, what Rosenne says about the political function of the Court may well lead to misunderstanding of its proper role and encourage its misuse. This tendency may be strengthened by the appearance later in the book of phrases such as 'the political function of adjudication' and 'the political function of international adjudication'. If the words 'political' and 'function' are properly understood and given precisely the right connotation, there is no doubt a substantial element of truth in this view. Experience has shown, however, that there is a risk that such language will lead some people in authority to regard the Court as a political instrument for achieving their political aims irrespective of the proper legal view of the rights and wrongs of the case. There is a strong temptation to try to use

<sup>1</sup> This *Year Book*, 34 (1958), p. 444.

<sup>2</sup> The law and procedure of the International Court of Justice, 1954-9: 'General Principles and Sources of International Law', this *Year Book*, 35 (1959), p. 183.

the Court to give judicial form to political views, which is not a proper use of the Court however widely and strongly those views may be held. It is possible that this attitude lay at the root of the trouble in the *South West Africa* cases, many governments hoping that the Court would give its stamp of approval to views expressed in a number of resolutions adopted by the General Assembly both before and after the matter was submitted to the Court by Ethiopia and Liberia.

Of course the judgments and opinions of the Court—even the possibility of reference to the Court—will have substantial political consequences. But it does not follow that the function of the Court is itself political in the same sense as the functions of the General Assembly and the Security Council are, broadly speaking, political. The proper function of the Court is essentially judicial. As stated in Article 1 of its Statute, it is the principal judicial organ of the United Nations. The failure to grasp this basic fact does not further the interests of the peaceful settlement of disputes which, after all, is one of the main purposes of the United Nations. It is important that governments should come to realize that the Court is, and should be treated and used as, a judicial organ, and to stress its political function does not serve this end.

Fortunately, Rosenne's opinion of the political function of the Court does not unduly colour his extensive treatment of the many important technical aspects of the operation of the Court with which the book is mainly concerned. One of the features of this treatment is the wealth of references to judgments and opinions of both Courts, but the use of the book is somewhat complicated by the abbreviated titles and the absence of the appropriate citations in many places. This mechanical deficiency could readily be cured by including the full titles of cases and their official citations in the list of cases at the end of the second volume. On the other hand, the appendices (nearly 100 pages) containing all the most relevant documents will prove a great help in the use of the book.

In his Preface, the author has expressed the hope that no further large-scale revision will become necessary, and that it will be sufficient to keep it up to date through supplements. One cannot help wondering whether this hope can be realized. The numerous and diverse references to cases make amendment by supplement difficult. In addition to the final judgment in the *South West Africa* cases (Second Phase), there are now further important judgments in the *Barcelona Traction* case and in the cases concerning the division of the continental shelf under the North Sea. Moreover, the Court is understood to be in process of revising the Rules of Court and this may well involve substantial modification of a number of passages in the book.

It is hoped that Rosenne will not be deterred from any revision that may become necessary, for he has provided us with a standard work on the Court which is worth keeping up to date.

FRANCIS VALLAT

*International Arbitration. Liber Amicorum for Martin Domke.* Edited by Pieter Sanders. The Hague: Martinus Nijhoff, 1967. viii and 357 pp. Dfl. 36.

As the editor, Pieter Sanders, and two of his colleagues say of Martin Domke in their Introduction: 'He is half the scholar, full of learning and up to date with information from all over the world—a comparative lawyer of considerable distinction. The other half of him is the shrewd down-to-earth salesman of a valuable commodity as



yet too little known but capable of being proved superior to its competitors. The advice he gives in developing countries is not academic but severely practical.' Certainly nobody in our times has done more than Martin Domke to promote the cause of international arbitration. This volume containing no fewer than thirty articles on that subject is therefore a most appropriate tribute to his work. The volume unfortunately contains no index, although it does have as an appendix a list of writings by Professor Domke himself on international arbitration.

The contributors are a very distinguished band of persons, mostly specialists in arbitration or at least in international economic and commercial law. They range alphabetically from P. I. Benjamin ('The Developing Nations and Certain Legislative Obstacles in the Field of International Commercial Arbitration') to Professor B. A. Wortley ('Quelques développements modernes qui touchent les controverses entre les particuliers et les États et les entités étatiques'). In between are to be found such names as Kenneth S. Carlston, René David, J. P. A. François, John N. Hazard, Richard B. Lillich, F. A. Mann, Edward D. Re, Shabtai Rosenne, Oscar Schachter, Ulrich Scheuner, Clive M. Schmitthoff, Georg Schwarzenberger, Ignaz Seidl-Hohenveldern, and Louis B. Sohn.

Rather than attempt to discuss each article individually, it seems better for the purposes of this review to divide them into groups. For instance, one group discusses arbitration processes in certain countries (e.g. Germany, Italy, Japan, the Soviet Union, the United Kingdom and the United States). Another group is more philosophical and speculative (e.g. Carlston on 'Psychological and Sociological Aspects of the Judicial and Arbitration Processes', David on 'L'avenir de l'arbitrage'). Another group is concerned mainly with disputes between States (e.g. François on 'La liberté des parties de choisir les arbitres dans les conflits entre les États', Rosenne on 'Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice', Scheuner on 'Decisions *ex aequo et bono* by International Courts and Arbitral Tribunals', Sohn on 'Arbitration of International Disputes *ex aequo et bono*' and Sompong Sucharitkul on 'Good Offices as a Peaceful Means of Settling Regional Differences'). However, as one would expect in the case of a tribute to Professor Domke, the main thrust of the volume is towards international commercial arbitration, particularly between States on the one hand and nationals, whether individuals or business enterprises, of other States on the other hand. In this context Dr. Broches and Professor Schwarzenberger both discuss the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965, drawn up by the International Bank for Reconstruction and Development, while Professor Sanders explains the E.C.A.F.E. Rules for International Commercial Arbitration and Dr. Schachter examines 'Conciliation Procedures in the United Nations Conference on Trade and Development'. Two contributors (Dr. F. A. Mann and Maître Jean Robert) are concerned with the relation between arbitration and the law; two others (Professor Lillich and Professor Re) are concerned with procedures for dealing with international claims; Maître Carabiber considers the effect of the doctrine of State immunity upon the arbitration process; and Professor Seidl-Hohenveldern examines 'Arbitration by Organs of International Organizations'.

In one of the most important articles Dr. Rosenne considers whether it is desirable, in a case (e.g. *Nottebohm*) where a State espouses before the International Court of Justice the claim of an individual—and especially in a case 'where the resolution of the legal issues may well depend upon a determination of facts, such as the state of mind of the individual concerned, which in most domestic legal systems would only be undertaken by the tribunal seized of the case after it had had an opportunity itself

to examine the individual, to observe his demeanour, and to hear his plea on the matter'—that the individual himself should be denied the opportunity of making known to the Court in his own way his own views on the questions of fact and the questions of law involved, and that the Court should be denied the opportunity of hearing him do so. Was it right, asks Dr. Rosenne, in the case originally designated case *Concerning the Guardianship of an Infant* and later significantly redesignated as *Application of the Convention of 1902 Governing the Guardianship of Infants*, that the Court should not hear the infant concerned and give at least some weight to his views? Dr. Rosenne concludes that, in such cases, the Court has, and should exercise, the power to permit an individual directly concerned to present himself before the Court and give his own version of the facts and his own construction of the law. 'It is not believed', he says, 'that this is inevitably excluded, either by the language of Article 34 of the Statute, or by the essential judicial character of the contentious jurisdiction as a jurisdiction applicable only between States.' This important matter deserves more consideration than it has so far received from international lawyers.

In so far as one of the merits of a *Liber Amicorum* lies in the opportunity it gives to writers to develop important ideas in a relatively informal way, the occasion was seized—as already indicated—by Professor Scheuner and Professor Sohn to take a fresh look at the problem of decisions *ex aequo et bono*. In the view of the former, the theoretical basis on which the power to decide cases according to this means was given to international tribunals is no longer valid. In contrast to the positivist doctrine that international law was an incomplete legal order, jurists now hold that every system of law, including even international law, 'rests upon some general principles which can guide a legal decision even in the absence of a detailed legal rule'. If provision for settlement of disputes *ex aequo et bono* survives in many treaties, this is because 'its task is not the filling of gaps in an incomplete international legal order, but the decision of cases in which not a point of law but a demand for a new adjustment of interests or for a change in the existing law is at issue'. Professor Scheuner proceeds to distinguish between decisions *ex aequo et bono*, general principles of law, equity and conciliation. His short essay is a masterpiece of lucid writing. Professor Sohn considers that the 'non-use of the many arbitration clauses accepting jurisdiction *ex aequo et bono* shows that these clauses were too ambitious'. It would be better, he thinks, to confer such powers not so much on an ordinary arbitral tribunal as on a 'special tribunal functioning in close co-operation with the United Nations'. If, for example, groups of experts could be set up to render advisory opinions *ex aequo et bono* and these opinions were then made the basis of recommendations by the Security Council or the General Assembly, States might have more confidence than they do at present in settlement of disputes through the main political organs of the United Nations where, so it seems at present, decisions are arrived at on the basis of no kind of justice whatever but purely of 'political manœuvring'.

A volume of this kind is much to be welcomed since the reader is not merely brought up to date on certain aspects of a key subject but is also given the opportunity and the stimulus to reflect upon a wide range of problems in international law.

D. H. N. JOHNSON

*Curso de derecho internacional público*, 3rd edition. By CÉSAR SEPÚLVEDA. Mexico City: Editorial Porrúa S.A., 1968. pp. 487. No price stated.

This new edition of Sepúlveda's basic textbook of public international law has appeared only three years after the second edition. It is intended that the book should



serve as an appropriate guide for students of international law without sacrificing 'the simplicity and conciseness' which, according to the author, should characterize any book for students of law.

The author starts by claiming that a different name should be given to international law on the grounds that the law 'has become socially conscious due to the expansion of its scope because of international organizations and some new rules regarding human welfare'. The work gives a short history of international law, with some references to what the author calls 'mediaeval relics in international law' which he does not fully describe. At the end of the historical chapter there is a conclusion about the so-called final stage of international law which is said to have begun in 1945. Here the author declares firmly that from that date there have been changes in international law because of the emergence of new States (which seems plausible) and because of 'the imperative of considering the welfare of human groups as the basic end of political action and ideology'. His underlying idea here is that the dimensions of international law have been 'universalized'. The book deals also with the struggle between Naturalists and Positivists and the author, after a criticism of the second, sides with the first. It also deals with the sources of international law and the problem of codification which is said by the author 'to reveal great potentialities for making international relations enter the channels of order, legality, and justice'. In the second part of the book the author treats of what he calls international common law, referring mainly to treaties and other international agreements, to territorial rights, and to States and their responsibilities. Some attention is devoted to the Calvo Clause in Latin American practice. The third part of this work refers to international organizations, including regional international organizations such as the Organization of American States of which a rather reasonable and balanced criticism is made. At somewhat too great a length and using more of an economic than a legal approach the author analyses the prospects and results of the Charter of Punta del Este which created the Alliance for Progress. The shortcomings of this programme, inspired by Kennedy to relieve the economic crisis of Latin America, are extensively described by the author. A final chapter discusses the solution of international disputes. There is a substantial appendix containing several documents such as the O.A.S. Charter and the Alliance for Progress Agreement and also some documents which refer to Mexican border problems. Sepúlveda's work aims essentially at producing a basic and up-to-date textbook for law students. It is a reasonably descriptive and informative work, though the bibliography is not very complete and footnoting is seldom used.

ANDRÉS BANDE

*Unilateral Denunciation of Treaty because of Prior Violations of Obligations by other Party.* By B. P. SINHA. The Hague: Martinus Nijhoff, 1963. xvii+232 pp. Dfl. 27.90.

The international law of treaties is, of course, the international law of contract writ large. Although the problems raised in municipal systems are not always reflected in international law or vice versa; similar questions arise very often indeed. One of these is the question of the effect upon the rights of the innocent party to an agreement of breach by the other, and up to a point the same difficulties arise in the law of treaties as in the law of contract.

The effect in English law is clear—the innocent may repudiate it and recover



damages, but his right to repudiate does not automatically terminate the contract. Just so as regards treaties. But a complication arises as to when the breach gives the right to repudiate. Must the breach be fundamental? English law says Yes. And so, according to Dr. Sinha and some earlier authorities, says the law of nations. How does one know if the breach is fundamental? This is not a question which permits of a very helpful answer. It is possible to approach it differently and inquire whether the term broken is fundamental or not and if it is not, can it be severed so as to deny the right to repudiate the whole transaction? These matters have of course caused much talk in the English courts of recent years (see, for example, the *Hong Kong Fir Shipping Co.* case [1962] 2 Q.B. 62; and the *Suisse Atlantique* case [1967] 1 A.C. 361); which bring such joy to the hearts of the students. (Incidentally, Dr. Sinha might have mentioned all this had he known about it, but his brief account seems to rely on the 1923 edition of *Miles and Brierly*. Although he can be excused for omitting the 1966 Draft Articles of the International Law Commission, since they had not been promulgated when he produced his work, someone had written on the English law of contract in the forty-three years' interval.) International lawyers discuss the same thing. By and large, the rules of each system as to the loss of the right of repudiation bear a close similarity.

But one factor makes the whole matter more critically important on the international plane, that being the absence of any adequate impartial adjudicating body to deal with claims that treaties have been breached. Now this shortcoming is not peculiar to the law of treaties, but it does tend to give a great deal of political and practical importance to the matter as some of the case studies in this volume amply show. Diplomatic discussions have in modern times been concerned with, for instance, the Munich Agreement of 1938, the fate of Yugoslav Treaties with Eastern European countries in and after the split in 1948, and the position of the treaties dealing with Germany at the end of the Second World War in connection with the Berlin question.

And so to the book itself. Apart from the awful title, as a whole it is really quite good. It gets off to a poor start, when Dr. Sinha discusses the view of the jurists. Unless the reader wishes to read the *ipsissima verba* of thirty-nine jurists and teams of jurists or to see if he can read English, French, German, Italian and Spanish (why not Russian?), he can be safely advised to skip all but the last paragraph or two. Things begin to brighten up when he gets on to judicial decisions. Chapter IV concerns private law analogies; these are mostly beyond the ken of the reviewer, but if they are all on a par with the piece on English law, already referred to, they are not remarkable. In his discussion on related problems, Dr. Sinha has some convincing things to say, especially in his argument to the effect that it is not, as Fitzmaurice alleges, impermissible for a State ever to withdraw from a so-called 'law-making' treaty.

The largest part of the book is devoted to a consideration of the practice of States and this, although it leans heavily on authorities such as McNair, is a satisfactory account, down to very recent times. In his conclusion the author states that an innocent party may repudiate for substantial breach of an indivisible treaty, or may denounce provisions in a divisible treaty which have been seriously affected by violation, and that unilateral denunciation must be exercised within a reasonable time. This is more or less what he set out to prove, and though it is not a very surprising conclusion, the verdict must be 'proven'. It must be said that the book is not very well written and not too well produced. Spelling mistakes abound, for instance on p. 2 'independant', on p. 87 'transference'. Proper names are often inaccurate, e.g. on p. 8, n. 1 'Alverston' for 'Alverstone', p. 116 'Transval' for 'Transvaal', and p. 119 'Vivians' for 'Viviani'. And long after he was awarded his knighthood, Sir Gerald is referred to as

'Mr. Fitzmaurice'. A bit more accuracy and some pruning of repetitious and tiresome material would have made clear the good points of the work.

J. G. COLLIER

*Les Actes juridiques unilatéraux en droit international public.*<sup>1</sup> By ÉRIC SUY. Paris: *Librairie générale de droit et de jurisprudence*; R. Pichon and R. Durand-Auzias, 1962. xii + 290 pp. No price stated.

This is a meritorious attempt to develop a homogeneous system for the unilateral act in international law thus filling a wide gap in doctrine. The author is strongly under the influence of the continental doctrine of the unilateral act, as the Germans had developed it under the heading of '*Rechtsgeschäft*' or the Italians of '*negozio giuridico*'.

The work begins with a description of the hierarchical structure of the international legal order and proceeds to a location of the unilateral acts in the hierarchy of the sources of law. A thorough analysis of the several unilateral acts follows, treating in detail: protest, notification, promise, renunciation and recognition. Since the author puts forward a very restrictive definition of the purely unilateral act, namely an autonomous manifestation of will, he is forced to conclude that notification does not fall within it. Moreover, he draws a sharp distinction between the purely unilateral declaration on the one hand, and the declaration unilateral by form only (which is in fact bilateral) on the other hand.

Developing the idea which underlies the principle of *pacta sunt servanda*, the author strongly supports the thesis that even purely unilateral declarations are binding, the only qualifications being, first, that the declarant had the intention to promise and, secondly, that the declaration must have become a basis of confidence for the promisee.

Finally, the author investigates the formation and legal character of customary law, and the role unilateral acts play herein. In a proposition, which certainly will not be accepted without criticism, the author substitutes the external conduct of States for the hitherto sacrosanct subjective element in the formation of customary law, namely the *opinio juris sive necessitatis*. For the author, conduct in the past is not only evidence of the *opinio*, but—appearing as recognition (acquiescence) or protest—the very source of customary law.

Suy's stimulating book gives not only a complete review of existing doctrine (perhaps too much stress is laid on theories), State practice and the decisions of the international courts and tribunals on the subject, but models it into a system of the unilateral act in international law. This will be appreciated all the more by the continental jurist, who must have felt its absence as a grave defect. More than that, Suy gives a clear and unmistakable answer to the question of the legal character and binding force of the unilateral act in international law.

W. KARL

<sup>1</sup> Thesis presented to the University of Geneva for the degree of *Docteur ès Sciences Politiques*.

*The Concept of Ius Cogens in International Law.* By ÉRIC SUY, B. S. MURTY and others. Conference on International Law, Lagonissi (Greece), 3–8 April 1966. Geneva: Carnegie Endowment for International Peace (European Centre), 1967. 140 pp. No price stated.

This volume contains papers and proceedings dealing with the second item on the agenda of the Carnegie Conference on International Law held at Lagonissi in April 1966. Besides papers prepared by Professor Éric Suy (Belgium) and Professor B. S. Murty (India) there is a summary of the discussion, by Professor George Abi-Saab, who also introduces the subject. An article by Professor Georg Schwarzenberger, first published in the *Texas Law Review* in 1965, is reprinted as an appendix. This question of a *ius cogens* has been given immediacy by the International Law Commission's Draft Articles on the Law of Treaties. Professor Abi-Saab, in his introductory remarks, warns of the confusion possible in a discussion in which participants use different terms to describe the same thing, or employ the same terms to describe different things. For this reason, Professor Suy, in his paper, is right to start by tracing the notion of *ius cogens* back to its origin. He defines *ius cogens* as 'the body of those general rules of law whose non-observance may affect the very essence of the legal system to which they belong, to such an extent that the subjects of law may not, under pain of absolute nullity, depart from them in virtue of particular agreements' (p. 18). A first manifestation of such rules Professor Suy discovers in the *ius publicum* of Roman law; but the expression *ius cogens*, according to Professor Suy, does not appear in any text before the nineteenth century. The writer then examines the concept of *ius cogens* in private law where the term 'public policy' or '*ordre public*' is used: public policy in municipal law 'is a concept which varies according to the fundamental needs of a given society and whose application results in limiting the autonomy of the will of the subjects of law in favour of the superior interests of the community'. This position the author distinguishes from the position in private international law, for he says: 'While in municipal law the non-conformity of a legal act with the rules of public policy makes the act null and void by reason of the illegality of its object, this could not be the case in private international law. A national judge could not declare null and void a legal act governed by foreign law and valid under that law. If the foreign law or the foreign legal act is contrary to the public policy of a given State this law is not applied or that act is not recognized by the national judge; no effects of the foreign law which is normally competent can take place within the State whose public policy could be interfered with by its application.' One may ask what declaring an act null and void means if not its non-recognition in a concrete case, depriving it of the effects it was originally intended to have or of any legal effects at all for reasons of its non-conformity with municipal public policy.

When examining the existence of *ius cogens* in public international law, Professor Suy first gives a review of the doctrine by quoting the views of fifty writers who have given their opinion on the subject. The overwhelming majority of them is in favour of the existence of peremptory norms in international law. Their content, their creation, the means for their assessment and their implementation, are, however, by no means generally agreed. And though it seems to be generally accepted that *ius cogens* consists of peremptory rules which render invalid any particular agreement between States that is at variance with them, different examples are given by different authors of the rules to which this quality is to be attributed. Most writers, however, find these rules among those for the preservation of international peace by the prohibition of the use of force, and those which are meant to guarantee the observance of a minimum of



humanitarian principles. One might describe them as rules created in the interest of the whole international community rather than for the benefit of individual States or, at any rate, as rules whose function it is to protect values transcending the immediate interests of individual States. Other writers conceive of them as those fundamental principles without which international law could not be considered a legal system, i.e. which are necessary for performing its role in international relations. Thus they assume the role of constitutional principles closely bound up with the concept of international law.

As to the creation of peremptory norms of international law, opinion is divided between those who insist that they can only be created by multilateral agreements and those who also consider custom and general principles of law as a source. Among the writers who consider treaties as the only way of creating international *ius cogens*, Professor Schwarzenberger requires in addition a certain level of international organization guaranteeing its efficacy. The criterion for ascertaining whether a certain rule of general international law is *ius cogens* or not, is either its material content or the legal effects—such as absolute nullity of incompatible agreements—which it engenders. Yet neither criterion affords secure guidance to the substance of *ius cogens*, for whilst the former seems too general, the latter only serves *ex post facto* in cases where a rule of customary law has already developed. Some authors, therefore, suggest that only arbitral tribunals are to be endowed with the task of assessing and enforcing rules of *ius cogens* in international law. The fear of abuse leads them so far as to demand compulsory jurisdiction as the condition for recognition of its existence in international law. These authors depart from pure legal reasoning to enter upon ground which is not truly the legal scientist's. A body such as the U.N. Conference on the Law of Treaties, however, may use this kind of argument with full justification. Professor Suy devotes his third chapter to an analysis of the work of official and private bodies, including the International Law Commission, the Sixth Committee of the United Nations General Assembly, the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, the Harvard Draft Convention on the Law of Treaties, the work of the International Law Association and the Menton Conference of the Carnegie Endowment (1965), the last of which discussed the related question of the extent to which newly independent States are bound by rules of general customary law. 'International Practice' is the heading of the last chapter. Here he adduces examples of *ius cogens* found in international jurisprudence (including individual and dissenting opinions), treaties and diplomatic practice.

In his 'General Conclusions' the author distinguishes certain elements of international public policy from those which he describes as uncertain or vague. Among the first category he finds those provisions incorporated in multilateral treaties which constitute the minimum of obligations from which, by particular agreements afterwards concluded, the parties have undertaken not to depart. Though, perhaps, relatively easy to ascertain, this kind of *ius cogens* tends to be less durable, since any treaty-revision may change its nature or content. Another clear indication of the presence of *ius cogens* Professor Suy finds in the fact that certain multilateral agreements establish the right of a State to bring an action against another State violating the agreement, even if the former's own interests have not been directly infringed. A third undoubted element of international public policy he detects in certain rules concerning the judicial system and the judicial function of an international court or tribunal. There are rules which have to be observed not only by the litigants but also by the tribunal. Another principle mentioned in this context is that of the independence of the

judiciary. A fourth point, which relates to international customary law, declares rules concerning the form of international agreements which must be observed so as to establish their validity to be of the character of *ius cogens*. Here Professor Suy refers to the obligation laid down in the United Nations Charter concerning the registration of treaties with United Nations. More difficult to define as international *ius cogens* in its concrete content are 'elementary considerations of humanity' as employed by the International Court of Justice in the *Corfu Channel* case (Merits) and in its advisory opinion concerning *Reservations to the Genocide Convention*. The same applies to the fundamental principles of the United Nations Charter, i.e. the prohibition of the use of force, independence and equality of States, and non-intervention in the internal affairs of a State. Professor Suy warns against deriving public policy in international law from public policies in municipal legal systems. 'Although', he says, 'all States recognize a principle in virtue of which particular agreements which are contrary to common decency are not valid, one should not draw from this the conclusion of the nullity of immoral international treaties' (p. 74). The author finishes his exposition with a forceful plea not only for the recognition of a minimum of public policy, but also for the creation of an enforcement-system which will ensure progress in the development of international law. His report not only served its purpose in presenting an excellent basis for discussion at the Lagonissi Conference but will have to be consulted in any future discussion of the problem.

Professor Murty's contribution, entitled '*Ius Cogens* in International Law', is a short, but lucid *exposé*. The author asks three questions: should international law recognize a *ius cogens*; does it already so recognize such a law; if so, what norms are so regarded? In answering the first, he rejects the argument that the recognition of *ius cogens* is a basis for the evasion of treaty obligations and for giving third States an excuse to interfere in matters not their concern, by drawing attention to the danger inherent in a rigid application of the rule *pacta sunt servanda*, and to the role third States play in securing the performance of treaty obligations. The answer to the second question gives him the opportunity to answer Professor Schwarzenberger's arguments against *ius cogens*. Professor Murty opposes the view that *ius cogens* is closely linked to the existence of a law-making authority endowed with sufficient power of physical coercion. According to Professor Murty, such an argument would not only call in question rules of *ius cogens* but also international law itself. 'A concept of power', he says, 'that underlies a legal system, which includes only physical coercion, is too narrow to supply a rational theory. The concept should include elements of voluntary compliance, persuasion as well as coercion' (pp. 80-1). If it is argued that customary rules of international *ius cogens* could not be precisely formulated, Professor Murty asks whether the same is not true with municipal customary law where the nature of certain rules as being of the character of *ius cogens* is not denied. If the existence of *ius cogens* is denied because of the norm *pacta sunt servanda*, the author replies that this prescription cannot be taken as an absolute one since, at any rate, it must be read in conjunction with the clause *rebus sic stantibus*.

In order to assess the content of international *ius cogens*, he suggests that the search for it should not only be directed to concrete rules and relatively generalized principles but also to the ultimate goal sought by the establishment of these rules and principles (p. 82). According to the author, they are to be found in the maintenance of a certain standard of civilization and humanity. It is for attaining these objectives that international law is based on the principles of sovereignty, equality, non-intervention in internal affairs, and territorial and personal supremacy.

PETER LEITENBAUER



*Politique et droit dans les relations internationales.* By ATHOS TSOUTSOS. Paris: Librairie générale de droit et de jurisprudence, 1967. 323 pp. No price stated.

Despite its title, this book is not a study of the connection between politics and law in international relations. It is a collection of unconnected essays, most of which were originally written in the early or middle 1950s. The first part of the book consists of two articles on the legal status of Germany, written in 1951 and 1949 respectively. They contain a large amount of historical information and some shrewd and original legal arguments, but have little relevance to contemporary aspects of the German problem. The second part of the book traces the development of the dispute between the United Kingdom and Greece over Cyprus up to the end of 1957. Despite its polemical tone, it is not without historical interest.

The third and final part of the book consists of a very long article on domestic jurisdiction and of very short articles on the concept of the State, the revision of the Charter, international crimes, judicial supervision of international legality, the effects of war on treaties, and the Common Market. The article on domestic jurisdiction is an excellent analysis of the *travaux préparatoires* of the Covenant and Charter, of the views of other writers, and of the practice and procedure of the United Nations; but unfortunately it covers only the early years of the United Nations. Some of the author's own ideas are stimulating (for instance, the application of the concept of *abus de droit* as a limitation to domestic jurisdiction on p. 188), but his use of federal analogies in defining the distinction between domestic jurisdiction and international jurisdiction is rather dubious. The article about the effect of war on treaties is also good, but the other articles in this part are too short to say anything which has not been said before. One article, which appears in English, should have been carefully revised before publication, since the style and grammar have serious defects.

MICHAEL AKEHURST

*International Law in an Organising World.* By WILLIAM L. TUNG. New York: Thomas Y. Cromwell Company, 1968. 604 pp. (appendices and index). \$8.75.

The basic aim of this work is to describe how international law has been developed and applied in an increasingly organizing world. This challenging task has not previously been attempted on a systematic basis and Professor Tung is to be congratulated for having drawn attention to its importance. Unfortunately, the author appears to have lost sight of his goal, and instead of providing a thorough-going analysis of the interaction between law and organization, he tends to follow the more customary technique of describing international law as it is, largely ignoring the dynamics. Even on the level of a students' textbook of the usual type, the work leaves something to be desired. Despite his Chinese origins, the author too often looks at international law from a purely American perspective. The treatment of the *lex lata* tends to be pedestrian and uncritical, and the few suggestions for reform do not always take account of the practical difficulties. Professor Tung is clearly erudite, as is evidenced by the very copious footnotes, but there are a number of mistakes (such as the statement on page 378, note 66 that the Permanent Court of Arbitration has been inactive since 1932), misleading statements and omissions. Finally, the text is marred by numerous



misprints, a memorable example of which is the statement (page 476, note 71) that Hudson's report of the judgment of the German *Oberprisengericht* in *The Indian Prince* is a translation from the French.

MAURICE MENDELSON

*Die dauernde Neutralität.* By DR. STEPHAN VEROSTA. Vienna: Manzsche Verlags und Universitätsbuchhandlung, 1967. 143 pp. No price stated.

The origin of the notion of permanent neutrality is to be found in the neutralization of Switzerland in the Vienna settlement of 1815: it is a felicitous conjunction that this very able and stimulating study of the institution should come from the holder of the chair of international law in the University of Vienna, Austria being the newest example of a permanently neutralized State.

This relatively short but most economically written work is rich both in material and in shrewd observation; as might be expected from an author who is not only a lawyer but also a historian who has had important first-hand experience in diplomacy. An introduction of some twenty pages provides a general examination of permanent neutrality and makes some necessary distinctions, particularly between permanent neutrality and the usual or normal temporary neutrality. There is an interesting discussion of a more adequate definition of the concept of permanent neutrality (pp. 15-16).

There follows a 'first part' which consists of an examination of the instances of permanent neutrality, not only as legal institutions but also to some extent historically: Sweden since 1815; Norway after 1905; Finland after 1944; Switzerland after 1815; and finally the position of Austria after 1918-19 and her permanent neutrality since 1955.

The 'second part', the longest and most important, is an examination of the law, assuming permanent neutrality to be a distinct institution of the international law of peace. The conclusions are drawn not only *a priori* but also from the analysis of the practice. To a considerable extent this law is necessarily concerned with the obligations laid upon a State to preserve and protect its permanently neutral status. This obviously raises difficult problems in relation to international organization. Thus, since political independence must be maintained it is not permissible, says Professor Verosta, for a permanently neutral State to enjoy full membership of the European Economic Community (p. 88).

This little book, no sentence of which is wasted, can be warmly recommended as an important contribution to our understanding of a problem which is both important in itself and also touches many aspects of international law in general.

R. Y. JENNINGS

*International Law in Historical Perspective*, vol. I. *General Subjects.* By J. H. W. VERZIJL. Publications of the Institute of International Law of the University of Utrecht. Leyden: A. W. Sijthoff, 1968. xii+575 pp. No price stated.

This work, of which the present volume is only the first of nine parts that are promised, is a general treatise on international law; but it is a treatise with a highly

original plan, for it has grown out of an early proposal to collect in an English version the author's papers 'placed in a brief systematic context'. Later the systematic exposition became a principal aim, so we are now presented with what is essentially a new work in which earlier papers appear, translated into English where necessary, sometimes as a part of the main text and sometimes as annex or excursus. The result is a work in which, as the apt title indicates, the exposition of present-day international law does indeed appear in its historical context. Thus, for example, the topic of sources is enriched by contemporary studies of the League of Nations Codification Conferences; the use of force and sanctions by contemporary studies of the legal and diplomatic history of the inter-war years, and so on.

This admirable plan is one which can be open to very few writers to adopt. Not only does it presuppose a wide variety of writings over a considerable period (a condition amply fulfilled here, as may be seen from the list to be found at the end of *Symbolae Verzijl*, published in 1958 for Professor Verzijl's 70th birthday), but also consistency of quality to an unusual degree. It is indeed remarkable how well the earlier papers written by Dr. Verzijl wear, how they hold the interest today, and how apposite to present-day problems they are.

The adoption of a plan of some nine volumes by one now entered upon his eighth decade also, as Professor Bos says in his introduction, 'bespeaks the author's total dedication to the subject which, standing in a centuries-old tradition, he has taught for so many years': in Chairs of International Law at Utrecht 1919-38 and 1947-58, in Amsterdam 1938-45, and Leyden 1945-56.

It must not be supposed that dedication to international law bespeaks a mere lawyer. Verzijl is scholar and man of letters in the great tradition; a polymath who is not shy of learning for its own sake. His papers range over history and international relations and over a great area of general literature. His knowledge of languages is formidable. Writing always clearly and often felicitously in a language not his own, he assumes in his readers acquaintance with Latin, French, German, Italian and Russian.

Clarity without oversimplification, candour, relentless analysis, intellectual integrity, and a contempt for any kind of wooliness, even of solemn wooliness sanctioned by long-usage, are the virtues displayed in these pages throughout. The style is personal and direct, for Verzijl is not at all afraid of using the first person singular. After the jargon of so much of today's legal writings, even of the good ones, it is as refreshing as it is unexpected to find in pages of remarkable scholarship a sentence like: 'I read an interesting book lately'. And indeed a feature of the whole volume is the quite excellent bibliographical references selected from the author's vast field of reading, inserted not only in footnotes but also in appropriate places in the text: they include for example under the discussion of the work of the International Law Commission a complete and extremely useful inventory, with references, of the work and reports of that body.

This first volume comprising the 'general part' is arranged in twenty chapters and it seems right in reviewing a work of such importance to set out the main headings seriatim: the sources and the relation between the sources; the interrelation between national and international law; public international law and other antithetical or related notions; might and right in international law—sanctions—war and other use of force—aggression—intervention; *pacta sunt servanda*—peaceful change; State and sovereignty; effectiveness versus legality; unity or diversity in international law, universalism, continentalism and regionalism; equality in the international order; the Act of State doctrine; 'abuse of rights'; the right of self-determination; the systematization of public international law; the interpretation of rules of international law; the

present legal structure of the international community; along the scaffolding of the edifice of the international legal order; a panorama of the law of nations; research into the history of the law of nations; Western European influence on the foundation of international law; the politico-legal development in the inter-war period.

Throughout, Dr. Verzijl provides exhilarating rather than comfortable reading, for he is a great destroyer of comfortable illusions. Of the different meanings attributed by various writers to 'general principles of law' he concludes: 'I do not think, in fact, that there is any author who seriously considers drawing the full consequences from his own interpretation' (p. 62); but Dr. Verzijl does draw the full consequences from these interpretations, with devastating and irremediable effect. Again, the notion that there are no lacunae in the system of international law he clearly regards as nothing less than a kind of intellectual dishonesty (p. 70). And that highly respectable sophistry by which a State's ability to fetter its sovereignty is said to be an attribute of that same sovereignty hardly survives the supposition that in that case perhaps 'the essential of health is the capability of falling ill' (p. 264). On the question of the legal force of General Assembly Resolutions one is taken straight to the heart of the matter: it is impossible, we are frankly told, to allow that they have 'binding force, however limited, as long as they remain the plaything of politics, being either acted upon or rejected according to from what quarter the political wind blows' (p. 77). The doctrine of 'abuse of rights' is tested, reasonably enough, by its hypothetical application to a vote in the Security Council or General Assembly against the admission of a qualified State to membership where the vote is cast on the ground that other applications ought to be admitted simultaneously. Here is an abuse of right; but can we say therefore that the negative vote is void? 'I doubt', says Dr. Verzijl, 'if the defenders of the theory would accept this consequence. Moreover, the nullity of the negative vote cast would not thereby be transformed into a positive vote' (p. 320).

The remarkably uniform standard of Dr. Verzijl's writing at all periods has already been mentioned. Yet certain parts of this volume stand out. The rigorous and full analysis of the problem of sources in international law, with its instructive examination of the origins of Article 38 (c) of the International Court's Statute, is of great importance; though boldly realistic in its insistence that there can indeed be important lacunae in the fabric of the law, yet entertaining at the same time scepticism about the so-called 'general principles' which so many see as a general stock in trade from which any gaps might be filled. And all international lawyers should read the pages analysing the problems of the codification of customary law. It is in the treatment of familiar and basic problems that the great strength and importance of this work is most strikingly seen; for Dr. Verzijl always seems to take his thinking on these problems several vital stages further than most commentators.

The chapter on the relationship of public international law 'and other antithetical or related notions' has, as an annex, the celebrated paper on 'the relevance of public and private international law respectively for the solution of problems arising from nationalisation of enterprises'; one of the select few discussions of this difficult question written by a jurist who is equally at home in public and private international law and who has thoroughly thought out the proper sphere of each system and their interrelation.

The chapters dealing with war, force, aggression and intervention, and also those dealing with the instruments and events of the League of Nations period, are extremely valuable, because they are firmly rooted in the diplomatic history; for the author is historian as well as jurist and whilst paying due regard to the *International Law Reports* he does not fail also to consult the *Annual Register*.

It should be said, perhaps, that there are in these pages views that will shock some;



though not the present reviewer. The author has little faith in 'so-called "political science"'. He is contemptuous of 'ideological fanfaronades, or artificial political smoke-screens', such as a so-called 'right to nationality', or a 'right to marry'; and moreover of the 'illusory and chameleon-like right of self-determination'. But this impatience with inexact notions and with the use sometimes made of them proceeds from a taut faith in the ultimate relevance of international law, which, Dr. Verzijl likes to insist, is the product of western civilization: 'The foundations of our Western society seem less sure today than they have been for many centuries, but if our Western civilization survives, as it certainly will, its international law, as we know it, will still prove to be a necessary cement to bind the future Community of States as it was found indispensable to bind the old' (p. 447).

It is clear from this first volume that this is going to be more than a very good treatise; it will be one of the major commentaries in any language on the law of nations.

R. Y. JENNINGS

*The International Law Standard and Commonwealth Developments.* By ROBERT R. WILSON and others. Durham, North Carolina: Duke University Commonwealth Studies Center, 1966. xii+306 pp. \$9.50.

The essays in this symposium are more concerned with Commonwealth developments than with international law. In Professor Howell's chapter on 'Domestic Jurisdiction', for example, the author is largely concerned with the history of the attitudes of Commonwealth countries to the meaning of this concept, and hardly seeks to draw conclusions of law from his survey of the practice of the convenient sample of States which the Commonwealth comprises. Even more remote from the consideration of issues in the particular context of international law is Professor Walker's interesting and informative discussion of the significance of changing patterns of Commonwealth trade in accounting for the United Kingdom's attempts to join the European Economic Community. The other chapters, whose titles sufficiently indicate their contents, are: 'Concepts of Statehood, 1917-1939', 'Neo-nationalism', 'Official Representation', 'Reception of Norms' and 'Appraisal' (Professor Wilson); 'Nationality and Citizenship', 'Extradition' and 'Naturalization and Registration' (Professor Clute); and 'Enforcement of Foreign Judgments' (Professor Piper).

The book contains some statements which would seem to be questionable. The following are examples: (i) In a footnote on page 97, Professor Wilson speculates that a unilateral declaration of independence by Southern Rhodesia, such as occurred after his contribution was written, might constitute a new manner in which a new Commonwealth State could emerge. But to consider the unilateral declaration of independence as an avenue to Commonwealth membership, rather than as an alternative to such membership, appears to reflect a surprising view of the basic political situation behind the Rhodesian crisis. Whatever the flexibility of the Commonwealth concept, it does not yet accommodate self-election against the opposition of all the present members. (ii) At page 111, Professor Clute interprets section 3 (1) of the British Nationality Act, 1948, as providing that a Commonwealth citizen might not be punished for an offence occurring outside the United Kingdom 'unless such an act would be punishable by the Commonwealth country of which the accused is a citizen if it were committed within a foreign country' (*italics supplied*). The words emphasized are, in effect, a gloss on the word 'offence' in sub-paragraphs (a) and (b) of the

sub-section in question, whose effect seems thereby to be misconstrued; the effect of the sub-section is, it is submitted, to exclude criminal liability where the act would be no offence against the law, not of the Commonwealth country, but of 'any part of the United Kingdom and Colonies or of any protectorate or United Kingdom trust territory', were the act committed by an alien in a foreign country. The object of the sub-section is simply to provide that, for the purpose of determining criminal liability, a Commonwealth citizen (not being a citizen of the United Kingdom and Colonies, etc.) shall be treated as an alien, and the Commonwealth country of which he is a national shall be treated as a foreign country. (iii) At page 109, Professor Clute suggests that the Constitution (Amendment) Act No. 2 of 1962 (Sierra Leone) required Sierra Leone citizens of negro descent to comply with strict conditions of length of residence or public service before being eligible for election to Parliament. But this would appear to miss the point of the provision, which sets out to impose such conditions only on those whose negro descent did not comply with the exacting definition formulated by the Act.

Subject to these reservations, this work would seem useful as supplying some interesting external perspectives on the evolution and development of the Commonwealth to its present form.

A. R. CARNEGIE

*The Vietnam War and International Law.* Edited by Richard A. Falk. Princeton University Press, 1968. ix+633 pp. Price not stated.

The Civil War Panel of the American Society of International Law has compiled this volume by grouping in three parts twenty articles published by sixteen authors between 1961 and 1967, the greater number dating from 1966 and 1967. There is in addition included a passage from de Vattel on civil war, a magazine article by John Stuart Mill on non-intervention, written in 1859 and likely to provoke some ironic smiles today, and extracts from reports and speeches of U Thant. The three parts comprise: a framework for legal inquiry, legal perspectives and world order perspectives. Some articles have been written in reply to others included in the volume, but the work as a whole is not designed to do more than present a number of different issues, positions and points of view in regard to the Vietnam War and no conclusions are offered. There is a valuable selection of documents including the Geneva Accords 1954 and the U.S. State Department Memorandum of Law on Vietnam of 4 March 1966.

Can the 'laws of war', outside the Geneva Conventions 1949, be effectively applied to conflicts in which at least one group not a State is a protagonist?

The contributions on the Vietnam war give a range of answers to the question. In the U.S. State Department Memorandum (p. 583) there is a bland, though intricately reasoned, defence of the legality of U.S. intervention. John Norton Moore, finding a purely 'legalistic' as deficient as a 'raw *realpolitik*' approach, considers that the function of international law is less to 'govern' the conflict than to help the analysis of its 'total manifold of events' and 'to provide norms of conduct for national and international decision-makers, to provide guides to the reasonable expectations of other actors in the international arena, and to clarify, through emphasis on dialogue about community common interest, a different range of policies' (p. 316). Professor Falk deplores the debasement of international law to an instrument of tactics or persuasion, and its use simply 'to bolster or bludgeon foreign policy', and finds that the United

States insistence upon treating North Vietnamese assistance to the Viet Cong as an 'armed attack' goes far towards destroying the legal distinction between civil and international war; and while recognizing the intractability of many legal issues, he believes that 'it remains essential to indicate as explicitly as possible the reasons that might justify violating legal expectations about the use of military power in each instance by documented reference to overriding policies' (pp. 396-7). Professor Friedmann considers that 'international law has neither motivated nor controlled the mutual interventions in Viet Nam. The war—which is not called a war—moves in a legal vacuum' (p. 301).

In this range of opinions then on the Vietnam war international law is variously seen as a determinant of policy; or as an instrument not of the control of situations but of their policy-oriented analysis; or as admittedly a body of rules but, even if rescued from misuse as propaganda for or against particular policies, as vulnerable to those that are 'overriding'; or finally as simply absent from the scene.

These divergences of view arise in part perhaps from the volume being almost wholly addressed to the macroproblems of the place of the Vietnam war in the world order and the legality or justification of armed intervention by the United States and its associates; the microproblems of particular ways of conducting hostilities there has little attention. This imbalance leaves areas of the conflict an unprobed source of disquiet and doubt, for the two groups of problems are in fact interrelated. So, in a review of the U.S. legal position it is said

that measures of defense must be proportional to the attack. The United States program of airstrikes against North Viet-Nam has been designed for the purpose of interfering with the transport to the South: destroying supplies intended for shipment to the South; in short to halt the continuing aggression by North Viet-Nam (p. 329).

Yet not only are the design of the programme and its execution distinct, but the principle of proportionality must require a reasonable approximation in scale, time and place between measures of defence and the attack against which it is directed. The huge scale, not disputed, of airstrikes and naval bombardment and the extent of damage in both North and South Vietnam, and their manifest inefficacy in achieving the named purpose, show a disproportion which invalidates any such argument from the right of self-defence.

J. E. S. FAWCETT

*Cases on Private International Law.* By J. H. C. MORRIS. 4th edition. Oxford: Clarendon Press, 1968. xxxii+531 pp. £3. 5s.

It is difficult to write a review of this new edition of Dr. Morris's casebook on private international law: it is also largely unnecessary. It is difficult because one is hard put to it to find anything to criticize: it is unnecessary because it would not occur to anyone acquainted with any of the earlier editions that the position could be otherwise.

Morris's *Cases on Private International Law* has an established and idiosyncratic excellence. The selected cases, or at the very least certain judgments culled from them, are reproduced pretty fully: the snappy snippet technique is generally eschewed. Cases are preceded by concise 'black letter' propositions which, direct and terse, are strictly not potted summaries or digests. Moreover, the book is much more than a casebook,



not only in the pedantic sense that it also includes selected statutory provisions having conflict of laws significance as well as cases, but also in that it contains twenty-four notes on difficult topics by the author himself. These latter, as has been intimated by several reviewers of earlier editions, are gems. They are short, succinct, penetrating and persuasive, sometimes, some might say, too persuasive.

The new edition appears eight years after the third edition, its immediate predecessor. The author has regarded his main task as being to bring the book up to date. Such a process is, however, no mere mechanical one in a fast-moving subject like the conflict of laws: a great deal happens in eight years. Dr. Morris has introduced twelve new cases and four new statutes and, although he has sternly and properly sought to conserve the scale of the book by omitting seventeen old cases and one old statute, there has been an overall increase of some eighteen pages. The new material includes three Canadian cases, *Schwebel v. Ungar*<sup>1</sup> on the incidental question, *Charron v. Montreal Trust Co.*<sup>2</sup> on contractual capacity, and *Century Credit Corporation v. Richard*<sup>3</sup> on the transfer of movable property, and one American case—the much-publicized *Babcock v. Jackson*.<sup>4</sup> Amongst English cases *Ali v. Ali*<sup>5</sup> (but not *Cheni v. Cheni*)<sup>6</sup> is included. Although only Lord Pearson's judgment is reproduced in full, *Indyka v. Indyka*<sup>7</sup> is inevitably a glutton for space. *Russ v. Russ*<sup>8</sup> is one of the few additions which the present reviewer might regard as not worthy of the space (six pages) given to it. Amongst new decisions which it was pleasing to see not included was that of the Court of Appeal in *Gray v. Formosa*.<sup>9</sup> On the other hand, a slightly surprising omission was *Blohn v. Desser*.<sup>10</sup> The decision of the Court of Appeal in *Sinclair v. Sinclair*<sup>11</sup> (on judicial separation) and that of the House of Lords in *Boys v. Chaplin*<sup>12</sup> (on torts and remoteness of damage) could not have been included as they were decided too late. One hopes that the author would have made room for the judgment of Scarman J. in the former, and one conjectures as to how he would have dealt with the judgments delivered in their Lordships' House in the latter.

The author's notes have been revised, particularly Note F on foreign divorces and Note L on torts. This was necessary in the former case in order to accommodate an analysis of the results and possible results of the *Indyka* decision. Houseroom is found for a discussion of *Babcock v. Jackson* in the newly written Note on torts. At the time of writing *Boys v. Chaplin*<sup>13</sup> had not reached the Court of Appeal, and the author does not disguise his long-held unorthodox views on choice of law in tort. But since then the nature of orthodoxy has itself become largely conjectural.<sup>14</sup>

Of some books history has said and will say: the First Edition was the best. It is not so with Morris's *Cases on Private International Law*: the Fourth Edition fully maintains the high tradition of its predecessors.

P. B. CARTER

<sup>1</sup> (1963), 42 D.L.R. (2d.) 622.

<sup>2</sup> (1958), 15 D.L.R. (2d.) 240.

<sup>3</sup> (1962), 34 D.L.R. (2d.) 291.

<sup>4</sup> (1963), 12 N.Y. (2d.) 473; 191 N.E. (2d.) 279.

<sup>5</sup> [1968] P. 564.

<sup>6</sup> [1965] P. 85.

<sup>7</sup> [1969] 1 A.C. 33.

<sup>8</sup> [1964] P. 315.

<sup>9</sup> [1963] P. 259.

<sup>10</sup> [1962] 2 Q.B. 116.

<sup>11</sup> [1968] P. 189.

<sup>12</sup> [1969] 3 W.L.R. 322.

<sup>13</sup> [1967] 3 W.L.R. 266.

<sup>14</sup> See House of Lords in *Boys v. Chaplin*, [1969] 3 W.L.R. 322.



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